

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 636.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
APPELLANT,

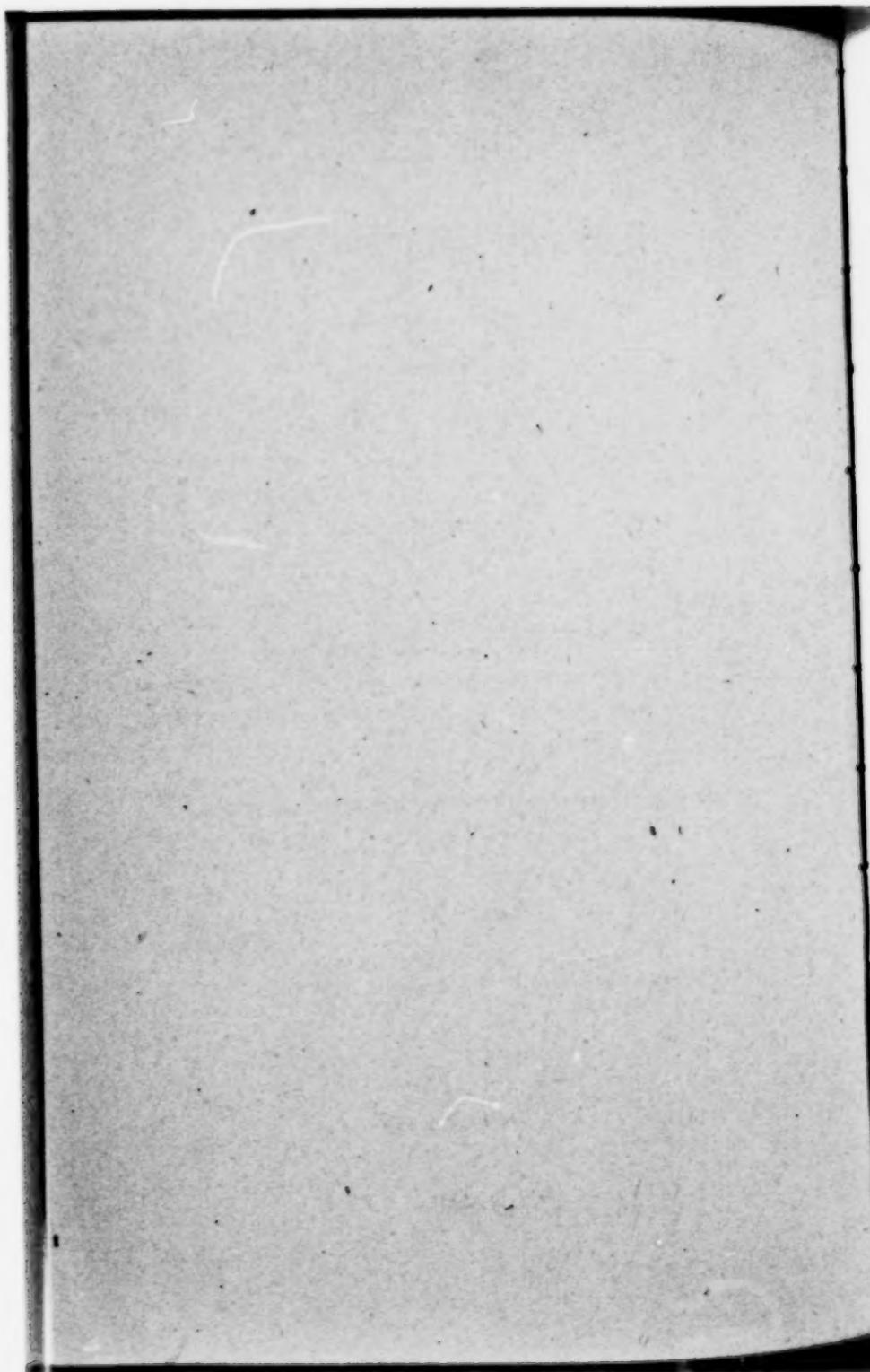
vs.

GEORGE H. MIDDLEKAMP, STATE TREASURER OF THE
STATE OF MISSOURI, AND FRANK W. McALLISTER,
ATTORNEY GENERAL OF THE STATE OF MISSOURI.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF MISSOURI.

FILED DECEMBER 4, 1920.

(27,993)



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a. United States District Court, Western District of Missouri,
Central Division.

No. 15 (Equity).

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Complainant,
vs.

GEORGE H. MIDDLEKAMP, Treasurer of the State of Missouri, and
Frank W. McAllister, Attorney General of the State of Missouri,
Defendants.

TRANSCRIPT OF RECORD AND PROCEEDINGS.

1. Pleas and Proceedings Had Before the District Court of the
United States for the Central Division of the Western Dis-
trict of Missouri in the Cause Entitled

(No. 15. In Equity.)

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Complainant,
vs.

GEORGE H. MIDDLEKAMP, Treasurer of the State of Missouri, and
Frank W. McAllister, Attorney General of the State of Missouri,
Defendants.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri,
and Frank W. McAllister, Attorney General of the State of Mis-
souri, Defendants.

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Complainant,
vs.

Be it remembered, that heretofore, to-wit, on the 20th day of April,
A. D. 1920, the following proceedings were had in said Court, in said
cause, to-wit:

Now this day comes the complainant by its solicitors and files its
bill against the defendants; and on motion of said solicitors, it is
ordered that a subpoena in chancery be issued herein against the
defendants, returnable in twenty days from this date. The follow-
ing other papers are filed this day, to-wit: motion for preliminary
injunction, motion for temporary restraining order; affidavit of E. T.
Miller; bond for restraining order; temporary restraining order;

Temporary Restraining Order.

In the District Court of the United States Within and for the Central Division of the Western District of Missouri.

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

v.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Temporary Restraining Order.

Whereas, in the above entitled cause, a motion for the issuance of a preliminary writ of injunction has been duly filed, the hearing thereof being hereby fixed for 10 o'clock a. m., on the 29th day of April, 1920, in the City of Kansas City, Missouri, in the District Court Room in the Federal Building, and it having been made to appear that there is danger of irreparable loss and damage being caused to plaintiff before the hearing of said application for a writ of preliminary injunction by defendant George H. Middlekamp, State Treasurer, certifying to defendant Frank W. McAllister, Attorney General, the tax bill against plaintiff referred to in the petition, and by the defendant Frank W. McAllister, Attorney General, instituting or causing to be instituted suit to enforce the collection thereof, together with the penalties and interest in said petition referred to, unless said defendants, and each of them, are pending such hearing restrained as herein set forth.

Now, therefore, take notice that upon the giving of a bond by plaintiff in the sum of One Thousand Dollars, with sixty to the approval of the Clerk of this Court, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may have been found to have been wrongfully enjoined or restrained herein by reason of this order, you George H. Middlekamp, State Treasurer, your assistants, agents, and employees, are hereby specially restrained and enjoined from certifying to the defendant Frank W. McAllister, Attorney General, the tax bill against plaintiff in the petition referred to, and you Frank W. McAllister, Attorney General, your assistants, agents and employees, are hereby specially restrained and enjoined from instituting or causing to be instituted any suit or other proceeding to enforce the collection of said tax bill, or the penalties and interest in respect thereof, in said petition mentioned, until the further order of this Court in the premises.

This temporary restraining order shall expire on the 29th day of April, 1920, unless prior to said date the same is for good cause shown further extended.

ABRA S. VAN VALKENBURGH,
District Judge.

Kansas City, Missouri, 19th day of April, 1920, at 12:30 o'clock p. m.

Bill of Complaint.

In the District Court of the United States Within and for the Central Division of the Western District of Missouri

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

v.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Petition.

St. Louis-San Francisco Railway Company, plaintiff herein, brings this its bill of complaint against George H. Middlekamp, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, as follows:

1.

Plaintiff, St. Louis-San Francisco Railway Company, is a corporation of the State of Missouri duly organized and existing under and by virtue of the laws of the State of Missouri, and is a resident and citizen of said State, and as such is now and was at the dates hereinafter mentioned duly authorized to engage in business as a common carrier of passengers and freight for hire in the State of Missouri and in various other states of the United States. Defendant, George H. Middlekamp, is now and was at all the dates hereinafter mentioned the duly elected, qualified and acting State Treasurer

of the State of Missouri, and defendant Frank W. McAllister is now and was at all the dates hereinafter mentioned the duly elected, qualified and acting Attorney General for said State. Each of said defendants resides in the Central Division of the Western Judicial District of Missouri.

2.

Plaintiff at all the dates hereinafter mentioned employed a part of its capital stock and property in business in the State of Missouri, and a part thereof in other states.

3.

The Legislature of the State of Missouri by an Act approved April 9, 1917, contained in the Laws of Missouri, 1917, at pages 237 to 242, attempted to impose by Section 1 of said Act an annual franchise tax upon every corporation organized under the laws of this State, said tax being in addition to all other fees and taxes now required or paid by such corporation, equal to 3 40 of one per cent. of the par value of such corporation's outstanding capital stock and surplus, or if such corporation employs part of its capital stock in business in another state or country, then such corporation is required under said Act to pay an annual franchise tax equal to 3 40 of one per cent. of its capital stock employed in the State of Missouri, and such corporation shall be deemed to have employed in the State of Missouri that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located. Section 1 of said Act further attempts to impose upon corporations not organized under the laws of this State but doing business herein an annual franchise tax equal to 3 40 of one per cent. of the par value of such corporations' capital stock and surplus employed in business within this State, and each such corporation shall be deemed to have employed in this State that proportion of its entire capital stock and surplus that its property and assets bears to all its property and assets wherever located. Said act further provides by Section 1 thereof that it shall not apply to corporations not organized for profit, not to express companies, nor to insurance companies.

By Section 2 of said Act every corporation liable to the Tax described therein is required to make a report in writing to the Missouri State Tax Commission annually on or before the first day of February in each year in a form to be prescribed by said State Tax Commission, and by Section 3 of said Act said State Tax Commission is required on or before the twentieth day of February in each year to determine from the facts contained in said report, and from any facts within or coming to its knowledge, the amount of franchise tax each corporation is liable to pay under the provisions of said Act and report the same to the State Auditor of said State, and said State Auditor is required by said Section 3 to make out a tax bill therefor against such corporation, deliver the same to said State Treasurer and charge said State Treasurer therewith. Said Section 3 further provides that said franchise tax shall be paid on or before the 15th day of April in each year, and shall be due and payable to said State Treasurer without notice, and that said State Treasurer shall make out and deliver a receipt therefor which shall recite that such cor-

poration has paid its annual franchise tax under the provisions of said Act for the year ending on the 31st day of the following December.

1

Section 4 of said Act requires every corporation organized under the laws of this State and every foreign corporation engaged in business in this State and having no capital stock, to make a report in writing to said State Tax Commission annually on or before the first day of February in form to be prescribed by said State Tax Commission and Section 5 of said Act provides what shall be contained in said report.

Section 6 of said Act requires said State Tax Commission to report to the State Auditor on or before the twentieth day of February of each year, and said State Auditor shall charge and certify to said State Treasurer on or before the first day of August of each year for collection, a fee of \$25.00 for every corporation organized as a mutual insurance corporation not having a capital stock, or any other corporation not organized strictly for religious, charitable or educational purposes and having no capital stock, or a company or association organized to transact business of life or accident insurance on the assessment plan. By said Section 6 all foreign life, fire, accident, surety, liability, steam boiler, tornado, health or other kind of insurance company coming within the provisions of said Sections 4 and 5 of said Act and doing business in this State having an outstanding capital stock of less than \$500,000.00 are required to pay an annual fee of \$50.00, and such companies having a capital stock of more than \$500,000.00 an annual fee of \$100.00, and all building and loan associations an annual fee of \$25.00, for the privilege of doing business in Missouri in lieu of the fee based on capital stock.

2

Section 7 of said Act provides that the taxes and penalties to be paid by the provisions of said Act shall be first lien on all property and assets of such corporation within the State of Missouri, and by Section 8 thereof said State Treasurer is required to certify to said Attorney General a list of such corporations who shall fail to pay said franchise tax on or before the first day of May, and the Attorney General is required thereupon to proceed forthwith to collect said tax together with a penalty of twenty-five per cent and interest at the rate of one per cent per month thereon, and any judgment obtained against such corporation shall be a first lien on all of its property and assets within this State.

By Section 9 of said Act provision is made for the forfeiture of the charters of domestic corporations and for the forfeiture of the right of foreign corporations to do business in this State, for failure or neglect to make the report to said State Tax Commission required by said Act, or for failure to make such report within the time by said Act required.

6.

By Section 10 of said Act all corporations whose fees are fixed at lump sums by said Act and all corporations who employ all their property and all their outstanding capital stock in Missouri, are not required to set out in their said reports the value of their property.

7.

Prior to February 1, 1919, and on, to-wit, January 31, 1919, plaintiff duly filed with said State Tax Commission its duly verified written report in the form prescribed by said Franchise Tax Act, said report showing, among others, the following facts: That the authorized capital stock of plaintiff was \$450,000,000.00; that its capital stock subscribed was \$57,947,026.00; that its capital stock issued and outstanding was \$57,947,026.00; that its capital stock paid up was \$57,947,026.00; that the par value of its capital was \$57,947.026.00; that it had no surplus or undivided profits; that the clear market value of its capital stock was \$8,100,742.00; that the clear market value of its property and assets real and personal in this State was \$122,826,652.00; that the clear market value of its property and assets without this State was \$206,232,896.00; that the clear market value of its total capital stock, surplus, property and assets was \$329,059,548.00; that the amount of its capital stock employed within this State was \$21,625,830.00; that the total amount of its capital stock employed without this State was \$36,321,196.00. In answering the interrogatories in said report calling for "clear market values," the values given therein were not intended to and did not exclude plaintiff's indebtedness and liabilities, but in order to arrive at a clear market value, if such term was intended to and did mean the net values after the indebtedness and liabilities were excluded, the clear market values stated in said report should be credited with the amounts of plaintiff's indebtedness and liabilities, and the affidavit of the Secretary of plaintiff was filed with said State Tax Commission containing such statement and explanation of the term "clear market values" as contained in said report. That the matters and things contained in said report as aforesaid were at the time said report was made, verified and filed, true and correct as plaintiff verily believes, and plaintiff states that the same were true and correct on its information and belief.

8.

On or about September 12, 1919, said State Tax Commission at a meeting thereof proceeded to consider and determine the amount of the franchise tax for the year ending December 31, 1919, it would assess against plaintiff, and said State Tax Commission did thereupon find the facts to be as stated in said written report theretofore filed with said State Tax Commission by plaintiff, except as to the

item of surplus, and that plaintiff was liable to pay under the provisions of said Franchise Tax Act as a franchise tax for said year ending December 31, 1919, the sum of \$92,119.99. In so determining said franchise tax said Commission found and determined that plaintiff's issued and outstanding capital stock was \$57,947,026.00; that the par value thereof was \$57,947,026.00; that the clear market value thereof was \$8,100,742.00; that the clear market value of plaintiff's property and assets in this State was \$122,-826,652.00; that the clear market value of plaintiff's property and assets without this State was \$206,232,896.00; that the clear market value of plaintiff's total outstanding capital stock, surplus, property and assets was \$329,059,548.00; that the amount of plaintiff's capital stock employed within this State was \$21,625,830.00; that the amount of plaintiff's capital stock employed without this State was \$36,321,196.00. Said State Tax Commission in finding the clear market values as aforesaid did not exclude plaintiff's indebtedness and liabilities, but its findings were the market values without deduction of plaintiff's indebtedness and liabilities. Said State Tax Commission further found that although plaintiff reported in said written report that it had no surplus and no undivided profits, yet in fact plaintiff did have at said time surplus of \$101,200,822.00, and that such surplus was subject to the payment of said franchise tax. The findings so made by said State Tax Commission were based wholly upon the matters and things reported to it by plaintiff. Said State Tax Commission thereupon on said twelfth day of September, 1919, found and determined that plaintiff was liable to pay a franchise tax for the year ending December 31, 1919, of 3/40 of one per cent of the par value of its outstanding capital stock employed within the State of Missouri, and 3/40 of one per cent upon said alleged surplus of \$101,200,822.00, said tax so computed amounting to \$92,-119.99, and thereupon reported to said State Auditor that plaintiff was liable to pay as a franchise tax for said year 1919 said sum of \$92,119.99. That thereafter and on a date unknown to plaintiff said State Auditor made out a tax bill against plaintiff in said sum of \$92,119.99 as franchise tax for said year 1919, and delivered said tax bill to said State Treasurer and charged him therewith, and said tax bill is now in the hands of said State Treasurer.

9.

If said Franchise Tax Act is constitutional and legal the amount of franchise tax for the year 1919 for which plaintiff would be properly chargeable thereunder, determined by the matters and things reported by plaintiff to said State Tax Commission and found by said State Tax Commission to be true, would be \$16,219.37, being 3/40 of one per cent of plaintiff's outstanding capital stock employed within this State. In order to avoid the excessive penalties imposed by said Act upon corporations failing or refusing to pay a franchise tax under the provisions of said Franchise Tax Act, plaintiff has heretofore tendered and paid to said State Treasurer the said sum of \$16,219.37, and has received from said State Treasurer his written

receipt therefor which contains a provision that neither the State of Missouri nor plaintiff waive their respective contentions as to the illegality of the franchise tax so assessed by said State Tax Commission by reason of said payment. Plaintiff has heretofore paid to the State of Missouri all taxes levied and assessed against its property and assets in this State for the year 1919.

10.

Plaintiff states that said Franchise Tax Act is unconstitutional and void because it violates Section 1 of Article XIV of the Amendments to the Constitution of the United States which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, in that, —

(1) The franchise tax sought to be imposed by said Act does not apply to corporations not organized for profit, nor to express companies, nor to insurance companies.

(2) The franchise tax of 3/40 of one per cent sought to be imposed by said Act upon the par value of plaintiff's outstanding capital stock and surplus does not apply to any corporations having no capital stock but having large surplus, whether such corporations be domestic corporations or foreign corporations doing business in the State of Missouri.

(3) The franchise tax of 3/40 of one per cent sought to be imposed by said Act upon corporations having a capital stock does not apply to corporations engaged in the same class of business within this State, whether domestic corporations or foreign corporations, having no capital stock, although said corporations having no capital stock have all the rights and privileges of doing business in this State given to corporations having a capital stock and employ their property and assets in this State with like effect as corporations having a capital stock.

(4) The franchise tax of 3/40 of one per cent sought to be imposed by said Act upon corporations having a capital stock is by said Act made payable on or before the fifteenth day of April of each year with heavy penalties provided by said Act for the failure to pay the same on or before the first day of May of each year, while corporations having no capital stock are required to pay annually a small fixed franchise tax and are not required to pay the same prior to the first day of August of each year, and no penalty is provided by said Act for the failure of such corporations to pay such small definite franchise tax.

(5) Because said Franchise Tax Act does not require corporations having no capital stock to report to said State Tax Commission the amount of such corporations' surplus and undivided profits, the

nature and kind of its business, the clear market value of its property and assets in this State or without this State, or the clear market value of its total surplus, property and assets, nor does said Act require said corporations having no capital stock to pay any franchise tax based upon or determined by their assets, property, surplus and undivided profits employed in this State.

11.

Plaintiff states that said Franchise Tax Act is unconstitutional and void because it violates Section 8 of Article I of the Constitution of the United States investing Congress with power to regulate commerce among the several states, in that,—

(1) Although the tax sought to be imposed by said Act is denominated a franchise tax, the same is in fact a property tax and constitutes a direct burden upon plaintiff's property used and employed by it in interstate commerce among the several states.

11. (2) Said tax is based in part upon the earnings of plaintiff from its interstate business.

12.

Plaintiff states that said Franchise Tax Act is unconstitutional and void because it violates Section 10 of Article I of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts, in that—

Said Act impairs the contract made between the State of Missouri and plaintiff under and by virtue of which plaintiff, for a certain consideration paid by it to said State, was granted the contractual right to engage in and transact business in said State, the consideration so paid by plaintiff being based upon and determined by the amount of plaintiff's capital stock, the amount so paid by plaintiff being in excess of \$225,025.00.

13.

Plaintiff states that said Franchise Tax Act is unconstitutional and void because it violates the Constitution of the State of Missouri, and particularly the following provisions thereof, to-wit:

(1) Section 2 of Article X which provides that the power to tax corporations and corporate property shall not be surrendered or suspended by act of the General Assembly in that said Act attempts to surrender the power to tax certain classes of corporations and certain corporations of the same class doing business in Missouri, especially referred to in said Act, and the property of such corporations.

15. (2) Section 3 of Article X which provides that the tax shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, in that (a) the tax

sought to be imposed thereby upon certain corporations of the same class is entirely different in nature and amount from the tax sought to be imposed thereby upon other corporations of the same class, and certain corporations of the same class are entirely excepted and relieved from the imposition of the tax; (b) said tax constitutes double taxation upon plaintiff's right to do business in this State.

(3) Section 4 of Article X whereby it is provided that all property subject to taxation shall be taxed in proportion to its value, in that the tax sought to be imposed by the Act upon certain corporations for the privilege of doing business in this State is entirely different in nature and amount from the tax sought to be imposed upon other corporations of a like nature and of the same class doing a similar or the same business in this State.

(4) Section 53 of Article IV of the Constitution which provides that the General Assembly shall not pass any local or special law granting to any corporation, association or individual any special or exclusive right, in that said Act expressly excludes from the operation and burden thereof certain domestic corporations doing business in this State, and certain foreign corporations doing business in this State, in that said corporations are permitted to transact business in this State without being subject to the same burdens as plaintiff.

(5) Section 7 of Article X whereby all laws exempting property from taxation other than the property enumerated in Section 6 of Article X are declared to be void, in that said Act attempts to exempt all classes of corporations not organized for profit, express companies and insurance companies, domestic corporations having no capital stock doing business in this State, and foreign corporations having no capital stock but doing business in this State.

14.

If plaintiff is mistaken in its belief that said Franchise Tax Law is unconstitutional and void, yet the tax thereunder sought to be charged against plaintiff as aforesaid is unlawful, unreasonable, confiscatory, excessive and void, in that—

(1) Said State Tax Commission failed to determine the amount of said tax on or before the twentieth day of February, 1919, and failed to report the same to said State Auditor prior to the fifteenth day of April, 1919, and said State Auditor failed to make out a tax bill therefor against plaintiff and deliver the same to said State Treasurer on or before said fifteenth day of April, 1919.

(2) Said State Tax Commission totally ignored the provisions of said Franchise Tax Act by assessing said tax not only upon the outstanding capital stock of plaintiff employed within this State but also upon the entire gross assets and property of plaintiff employed within this State.

17 (3) Said State Tax Commission totally ignored the provisions of said Franchise Tax Act by using as a basis for determining said tax the property and assets of plaintiff instead of basing said tax solely upon plaintiff's outstanding capital stock employed in Missouri.

(4) Said State Tax Commission totally ignored the provisions of said Franchise Tax Act in using as a basis for determining said tax the total value of plaintiff's property and assets employed within the State of Missouri without deducting therefrom or considering the plaintiff's indebtedness and liabilities.

(5) Said State Tax Commission totally ignored the provisions of said Franchise Tax Act in assessing a property tax upon plaintiff's property rather than a franchise tax upon its right to do business in his State as provided in said Act.

(6) Said State Tax Commission totally failed to carry out the intention and purpose of the Legislature in enacting said Franchise Tax Act, in that it failed to give to the term "surplus," as used in said Act, the common, usual and ordinary acceptation thereof intended by said Legislature.

(7) Said State Tax Commission in assessing said tax against plaintiff, wrongfully and unlawfully, grossly discriminated against plaintiff in favor of other corporations, including other railroad corporations, doing business in the State of Missouri, in that said State Tax Commission measured the tax of said other corporations, 8 or some thereof, by their outstanding capital stock employed in this State and by their surplus employed in this State, giving the term "surplus" the correct meaning thereof, to-wit, the excess of assets over liabilities.

(8) Said State Tax Commission ignored the fact that plaintiff was not doing business in the State of Missouri during any part of the year 1919. Said State Tax Commission totally ignored the fact that the Government of the United States was in possession of and operating the railroad of plaintiff during the entire year of 1919, and that plaintiff was thereby deprived of the right to exercise its charter authority to do business in the State of Missouri during said year or any part thereof. For said reasons the State of Missouri was without right or authority through said State Tax Commission, or otherwise, to assess or collect said tax.

A large number of reports filed by other corporations with said State Tax Commission under said Franchise Tax Act failed to contain statements as to the values of such corporations' property and assets in this State, and although said State Tax Commission well knew that such corporations had property and assets in this State of large values, and although said State Tax Commission had ample power and authority under said Franchise Tax Act to ascertain and

determine, and by the terms of said Act it was its duty to ascertain and determine, such values of such property and assets, it which failed to do so or to take any steps thereto, but determined the amount of franchise tax to be paid by such corporations by the amount of their outstanding capital stock employed in this State, thereby amounting to that extent favoring such corporations and discriminating against other corporations, including plaintiff, who reported the values of their property and assets in this State.

Other railroad corporations doing business in this State and similarly situated as plaintiff in their written reports to said State Tax Commission under said Franchise Tax Act reported the value of the property and assets in this State on a capital stock basis—that is to say, that the capital stock of such corporations employed by them in this State was made the full measure of the value of such corporations' property and assets in this State, and said State Tax Commission in assessing and determining the franchise tax to be paid by such corporations used said capital stock basis as the basis thereof, although said State Tax Commission well knew from its own records that the property and assets of such corporations employed in this State were largely in excess of the amount shown in said reports.

16.

This is a suit in equity involving the Constitution and laws of the United States and the amount in controversy, exclusive of interest and cost, exceeds the sum of \$5,000.00.

17.

For the reasons aforesaid plaintiff states that said tax so wrongfully and unlawfully assessed against it is illegal and void, and that the manner of assessing and determining the same amounted to fraud upon plaintiff's constitutional rights as aforesaid, and wrongful and unlawfully discriminated against plaintiff and in favor of other corporations; that the same constitutes a cloud upon the title to property within this State; that unless the defendant George H. Middlekamp, State Treasurer, and his assistants, servants and agents be enjoined from certifying to the defendant Frank W. McAllister, Attorney General as aforesaid, the amount of said tax and the failure of plaintiff to pay the same, said tax will be so certified to said defendant Frank W. McAllister, as Attorney General, as delinquent, and said defendant Frank W. McAllister, Attorney General, whereupon proceed to institute and prosecute a suit against plaintiff for the recovery thereof and for the recovery of the burdensome and oppressive penalties imposed by said Act by reason of such alleged delinquency, unless said defendant Frank W. McAllister, Attorney General as aforesaid, and his assistants, agents and employees restrained and enjoined from taking any steps to enforce the collection by suit or otherwise of said tax and penalties; that plaintiff

without adequate remedy at law; that the damages that will be suffered by plaintiff unless the writ of injunction of this Court issue against said defendants George H. Middlekamp and Frank W. McAllister, as aforesaid, are irreparable; that plaintiff has no remedy save in a court of equity.

Wherefore, in as much as plaintiff is without adequate remedy in a court of equity, plaintiff prays:

- (1) That this Honorable Court issue its writ of subpoena in due course of law directed to said George H. Middlekamp, State Treasurer, and to said Frank W. McAllister, Attorney General, commanding them, and each of them, at a certain date, and under a certain penalty to be therein specified, to appear before this Honorable Court and to answer all and singular the matters and things hereinbefore set forth and complained of, but not under oath (answer under oath being hereby expressly waived), and further to reform and abide by such further order, direction or decree as to this Court shall seem proper.
- (2) That said defendant George H. Middlekamp, State Treasurer, his assistants, agents and employees, be restrained by injunction, preliminary until final hearing and perpetual thereafter, from certifying to said Frank W. McAllister, Attorney General, said tax bill against plaintiff, and from certifying that plaintiff is delinquent in respect of said franchise tax, and from taking any steps to enforce or attempting to enforce the payment of said franchise tax, and that said defendant Frank W. McAllister, Attorney General, his assistants, agents and employees, be restrained by injunction, preliminary until final hearing and perpetual thereafter, from taking or attempting to take any steps to enforce the collection of said franchise tax, penalty and interest thereon, from instituting or prosecuting or attempting to institute or prosecute any suit or suits against plaintiff to collect said franchise tax, or any penalties or interest thereon, and from taking or attempting to take any other action against plaintiff or its property in respect of said franchise tax by civil or criminal proceedings.
- (3) That plaintiff may have such other and further relief in the premises as to this Honorable Court may seem proper.

ST. LOUIS-SAN FRANCISCO RAILWAY
COMPANY,
By J. M. KURN,

Its President.

W. F. EVANS,
E. T. MILLER,
H. S. CONRAD,
Solicitors for Plaintiff.

22 UNITED STATES OF AMERICA.

*Central Division of the Western
District of Missouri, City of St. Louis, as:*

J. M. KURN, being duly sworn, deposes and says that he is President of St. Louis-San Francisco Railway Company, plaintiff above named; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations therein contained are true of his own knowledge except as to such allegations as are made on information and belief and those he believes to be true.

J. M. KURN.

Subscribed and sworn to before me this 17th day of April, 1920
My commission expires October 8, 1920.

[SEAL.]

R. L. KLEIN,
Notary Public, St. Louis, Missouri.

23 Afterwards, on the 23rd day of April, A. D. 1920, the following further proceedings were had in said cause, to-wit:

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, Treasurer of Missouri, and FRANK W. McALLISTER, Attorney General of Missouri, Defendants.

Now on this day is filed an order designating the Judges to hear this cause, signed by Hon. Arba S. Van Valkenburgh, Judge as follows, to-wit:

In the District Court of the United States for the Central Division of the Western District of Missouri.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer, and FRANK W. McALLISTER, Attorney General, of the State of Missouri, Defendants.

Order.

An interlocutory injunction being prayed in the above entitled cause to restrain the enforcement, operation, and execution of an Act of the legislature, approved April 9th, 1917, imposing an annual franchise tax upon certain corporations therein named, and to restrain the action of the above named officers in the enforcement and execution of such statute, and in conformity with the provisions of Section 266 of the Judicial Code, the undersigned having called to his

istance, to hear and determine said application, the Honorable Kimbrough Stone, United States Circuit Judge, and the Honorable Martin J. Wade, United States District Judge.

It is ordered that the aforesaid application shall be heard before the above named judges and the undersigned at the court room of the United States District Court for the Western Division of Missouri at Kansas City, in said district, on Thursday, April 29th, 1920, at 10 o'clock in the forenoon of said day.

Kansas City, Missouri, April 22, 1920.

ARBA S. VAN VALKENBURGH,

Judge.

Afterwards, on the first day of May, A. D. 1920, the following further proceedings were had in said cause, to-wit:

Now on this day is filed for record, an order signed by Hon. Arba S. Van Valkenburgh, Judge, as follows to-wit:

In the District Court of the United States within and for the Central Division of the Western District of Missouri,

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP et al., Defendants.

Order.

Upon application of plaintiff, it is hereby ordered that it be permitted to amend its petition in this cause by adding paragraph 8 to sub-division 14 of its petition, said paragraph being in words and letters as follows, to-wit:

"Said State Tax Commission ignored the fact that plaintiff was not doing business in the State of Missouri during any part of the year 1919. Said State Tax Commission totally ignored the fact that the Government of the United States was in possession of and operating the railroad of plaintiff during the entire year of 1919, and that plaintiff was thereby deprived of the right to exercise its charter authority to do business in the State of Missouri during said year and any part thereof. For said reasons the State of Missouri was without right or authority through said State Tax Commission, or otherwise, to assess or collect said tax."

KIMBROUGH STONE,

Pres. Judge.

25. Afterwards, on the 10th day of May, A. D. 1920, the following further proceedings were had in said cause, to-wit:

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Complainant,
vs.

GEORGE H. MIDDLEKAMP, State Treasurer of Mo., and FRANK W. McALLISTER, Attorney General of Missouri, Defendants, *Defendants.*

Now on this day is filed the joint answer of the defendants and an application for an order for a subpoena duces tecum; also an order for subpoena duces tecum; signed by Hon. Arba S. Van Valkenburgh, Judge, as follows to-wit:

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff.

vs.

George H. Middlekamp et al., Defendants.

Order.

Upon application of plaintiff in the above entitled cause, the court hereby orders and directs subpoena duces tecum in the above cause as follows:

(A) To the Secretary or Clerk of the State Tax Commission of the State of Missouri to produce in this court on April 29, 1920, records as follows:

1. Reports made by all railroad corporations, foreign and domestic, including street railways, to the said State Tax Commission under the Franchise Tax Act enacted in the year 1917 for the year 1919.

2. Reports made to said State Tax Commission upon which the ad valorem taxes were made.

3. The amount of the Franchise Tax for the year 1919 assessed by the State Tax Commission against said corporations.

4. The valuation of property for property taxes assessed by said State Tax Commission for the year 1919 upon said corporations.

5. The record book of the State Tax Commission upon which certificates were made to the State Auditor for Franchise taxes
26. for the year 1919 for said corporations.

6. Record of said State Tax Commission showing property values of said corporations as determined by it and certified to the State Board of Equalization.

B. To the Clerk or Secretary of the Board of Equalization of the State of Missouri to produce in this Court on April 29, 1929, the records showing values of property of the corporations aforesaid as determined by said Board of Equalization.

ARRA S. VAN VALKENBURGH.

District Judge.

27. *Joint Answer of Defendants.*

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff.

v.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

The Joint and Several Answers of George H. Middlekamp, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, to the Petition.

Now come George H. Middlekamp, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, defendants, and answering the petition herein, say:

I.

Plaintiff's petition herein is insufficient because:

1. Said petition does not state facts sufficient to constitute a cause of action against these defendants.

28. 2. Because said petition does not state facts sufficient to entitle plaintiff to the equitable relief sought, or to any equitable relief whatever.

3. Because said petition shows upon its face that plaintiff is not entitled to an injunction or to any other equitable relief.

II.

Further answering plaintiff's petition herein, defendants:

1. Admit the facts alleged by plaintiff in paragraph 1 thereof.

2. Admit the facts alleged by plaintiff in paragraph 3 thereof.

3. Admit the facts alleged by plaintiff in paragraph 1 thereof.
4. Admit the facts alleged by plaintiff in paragraph 5 thereof.
5. Answering paragraph 6 of plaintiff's petition, defendants deny that all corporations which employ all their property and all their outstanding capital stock in Missouri are not required to set out in their said report the value of their property, under the provisions of Section 10 of said act, as alleged in paragraph 6 of said petition, but aver that only those corporations, the fees of which are fixed at a lump sum, or which are not organized for profit and have no capital stock, or which are not organized or admitted under the general corporation laws applying to corporations organized for profit, are not required to set out in their report the value of its property within this state or without the state.
6. Admit the facts alleged by plaintiff in paragraph 7 thereof.
7. Defendants, answering paragraph 8 of plaintiff's petition, say that on or about September 12, 1919, to-wit: on September 1, 1919, the State Tax Commission determined the amount of the franchise tax plaintiff was liable to pay for the year ending December 31, 1919, and that said tax amounted to the sum of \$92,119.99, as alleged by plaintiff; that the assessment so made by said State Tax Commission was based upon the sworn return of said plaintiff, and the figures so sworn to by plaintiff were accepted by said State Tax Commission as true and correct; that said report stated that the clear market value of plaintiff's property and assets in this State was \$122,826.652, and that the par value of its outstanding capital stock employed within this State was \$21,625.839; that said State Tax Commission found that the difference between the clear market value of said corporation's property and assets in this State, irrespective of how or by what means acquired, and without reference to said corporation's indebtedness, and said par value of said issued and outstanding capital stock employed within this State was the sum of \$101,200.822, and that such sum was, within the contemplation of said franchise tax law, surplus, and subject to said franchise tax of three-fortieths of one per cent, to-wit: the sum of \$92,119.99; that said franchise tax in said sum of \$92,119.99, so found and determined by said Tax Commission on said 14th day of September, 1919, was thereafter, to-wit: on the 12th day of September, 1919, certified to the State Auditor, and that said Auditor, on the same day, to-wit: the 12th day of September, 1919, made out a franchise tax bill for the year 1919, against said plaintiff, in said sum, and delivered the same to the State Treasurer, charging him therewith.

Defendants further say, in answer to said paragraph 8 of plaintiff's petition, that while the final order of assessment against plaintiff was not made until the 14th day of September, 1919, said matter had been pending and in process of determination since and prior to the 26th day of February, 1919; that said delay in the final order of assessment was occasioned by the differences existing between said Tax Com-

mission and said plaintiff as to the manner and the correct basis for the assessment of said tax, and the continuance of said matter from time to time to comply with plaintiff's demand for further hearings and consideration before the final determination of the amount of said tax.

8. Defendants, answering paragraph 9 of plaintiff's petition, deny that the amount of plaintiff's franchise tax for the year 1919 would be three-fortieths of one per cent of plaintiff's outstanding capital stock employed within this State, or the sum of \$16,219.37, but aver that said franchise tax so due to the State of Missouri is three-fortieths of one per cent of plaintiff's outstanding capital stock plus the excess or surplus of plaintiff's assets employed in business in this State over its outstanding capital stock employed in this State, or the sum of \$92,119.99.

9. Defendants admit that plaintiff tendered and paid to the State Treasurer of Missouri the said sum of \$16,219.37, and received from said State Treasurer his written receipt therefor, but defendants deny that said receipt contains any provision relating to the illegality of the franchise tax so assessed, but, on the contrary, said provision relates merely to the difference existing between plaintiff and the State as to the amount only of said tax due the State.

Defendants, further answering said paragraph 9 of said petition, admit that plaintiff has heretofore paid to the State of Missouri all taxes levied and assessed against its property in this State for the year 1919.

10. Answering paragraph 10 of plaintiff's petition, defendants deny that said franchise tax act violates Section 1 of Article XIV of the amendments to the Constitution of the United States, because said tax does not apply to corporations not organized for profit, nor to express companies, nor to insurance companies, or because it does not apply to corporations having no capital stock, but aver that the placing of express companies, which under a previously enacted statute pay annual taxes on their gross receipts in this State, and insurance companies, which under previously enacted statutes pay annual taxes on their gross premium receipts in this State, and corporations, which are not organized for profit, in separate classes from plaintiff and other corporations doing a different kind of business, is a valid and legal classification of corporations for the purpose of taxation, and is not discriminatory.

11. Defendants, further answering said paragraph 10 of said petition, deny that said franchise tax imposed by said act upon corporations having a capital stock does not apply to corporations engaged in the same class of business within this State as plaintiff, deny that corporations, either domestic or foreign, having no capital stock, are engaged in business in this State having all the rights and privileges given corporations having a capital stock, and employing their property and assets in this State with like effect as corporations having a capital stock; deny that any corporation having no capital stock and engaged in the same class of business within this State as the business carried on by plaintiff or

other corporations organized for profit, is organized under the laws of this State or permitted to do business in this State; deny that said franchise tax violates said fourteenth amendment in that it provides for different dates of payment of said tax by different classes of corporations, one of which pays a tax while the other pays a fixed fee, or in that penalties for failure to pay within the designated time are imposed upon capital stock corporations doing business for profit, while no penalties are imposed for such failure upon non-capital stock corporations which are not organized for profit and which cannot engage in the same class of business which plaintiff carries on; deny that said act violates said fourteenth amendment in that it permits non-capital stock corporations to make a report to the State Tax Commission different in form from that made by capital stock and profit-sharing corporations, or in that said act requires such non-capital stock corporations to pay a fixed fee instead of a tax measured by their property and assets employed in the State; deny that there are any corporations, foreign or domestic, without capital stock, doing business in this State, which carry on the same kind and nature of business as the business of plaintiff or which are organized for profit.

Further answering paragraph 10 of said petition, defendants say that even if the alleged facts in said paragraph 10 were true, such facts, whether standing alone or whether taken in connection with any other fact or facts alleged in the petition, are insufficient to constitute a cause of action against these defendants or to entitle plaintiff to the relief prayed or to any relief whatever.

10. Answering paragraph 11 of plaintiff's petition, defendants deny that said franchise tax act violates Section 8 of Article 1 of the Constitution of the United States, or that the tax imposed is a property tax, or that it constitutes a direct burden upon plaintiff's property employed in interstate commerce, or that such tax is based in part upon the earnings derived from plaintiff's interstate business.

Further answering said paragraph 11, defendants say that the allegations thereof, whether standing alone or taken in connection with any or all of the facts alleged in said petition, are insufficient to entitle plaintiff to the relief prayed or to any relief whatever.

11. Answering paragraph 12 of plaintiff's petition, defendants deny that said franchise tax act violates Section 10 of Article 1 of the Constitution of the United States, or that it impairs any contract made between the State of Missouri and plaintiff relating to the contractual right of plaintiff to engage in and transact business in this State or that any contract of the character alleged exists between plaintiff and the State of Missouri.

34. Further answering said paragraph 12, defendants say that the matters and things therein alleged, whether standing alone or taken in connection with any or all of the facts alleged in said petition, are insufficient to constitute a cause of action against these defendants or to entitle plaintiff to the relief prayed or to any relief whatever.

12. Answering paragraph 13 of plaintiff's petition, defendants deny that said franchise tax act violates Section 2 of Article X of the Constitution of Missouri, or that said act surrenders or suspends the power to tax certain classes of corporations and certain corporations of the same class doing business in Missouri, or surrenders or suspends the power to tax the property of such corporations; deny that said franchise tax act violates Section 3 of Article X of the Constitution of Missouri, or that such tax imposed upon certain corporations of the same class is entirely different in nature and amount from the tax imposed upon other corporations of the same class, or that certain corporations of the same class are entirely excepted and relieved from such tax, but aver the fact to be that said tax is imposed impartially and uniformly upon all members of the same class, and differences exist only where there are differences in classification; deny that said tax constituted double taxation upon plaintiff's right to do business in the State of Missouri; deny that said act violates Section 4 of Article X of the Constitution of Missouri, or that the tax imposed upon certain corporations is entirely different in nature and amount from the tax imposed upon other corporations of a like nature and of the same class, doing a similar or the same business in this State; and defendants further say that said Section 4 of Article

X of the Constitution of Missouri has no reference to
35 the character of tax imposed by the franchise tax act, but

relates to property taxation only; deny that said franchise tax act violates Section 53 of Article IV of the Constitution of Missouri, or that said franchise tax act is a local or special law granting to any corporation, association or individual any special or exclusive right, and aver the fact to be that said franchise tax act is a general law, applicable alike to each and every member of the same class; deny that said act violates Section 7 of Article X of the Constitution of Missouri, or that such act exempts property from taxation, or that said Section 7 of Article X is in any wise applicable to a franchise or excise tax; but defendants assert that said Section 7 of Article X is, upon its face and by construction, applicable solely to property taxes.

Further answering said paragraph 13, defendants aver that the matters and things therein alleged, whether standing alone or taken in connection with any or all of the facts alleged in said petition, are insufficient to constitute a cause of action against these defendants or to entitle plaintiff to the relief prayed or to any relief whatever.

13. Answering paragraph 14 of plaintiff's petition, to the effect that such tax, though constitutional and valid, is unlawful, unreasonable, confiscatory, excessive and void, defendants, using the same numerals used by plaintiff to indicate its several complaints, say:

(1) Plaintiff is estopped to urge as a basis for the relief prayed that said tax was not determined, reported to the State Auditor, and the tax bill therefor delivered to the State Treasurer on or before
36 the 15th day of April, 1919, because the delay in the determination and report of said tax and the making out of the tax bill therefor against plaintiff, was occasioned by the acts

of plaintiff itself; that the proceedings for the determination of the same were continued from time to time, at the request and repeated demands of plaintiff, in order that it might fully present all of the facts and its contentions as to the amount of the tax due and owing by it to the State before the final determination of the amount of said tax by said State Tax Commission; that the last papers filed by plaintiff with said State Tax Commission, relating to the assessment and determination of said franchise tax, were filed by plaintiff on the 23rd day of August, 1919; that said tax was finally determined by said State Tax Commission upon the 4th day of September, 1919, and upon the 12th day of September, 1919, said tax was certified to the State Auditor, who, upon the same day, delivered said tax bill to the State Treasurer of the State of Missouri; that in truth and in fact the delay was occasioned wholly by the acts of plaintiff, and it does not lie in its mouth to complain of such delay when the same resulted from the State Tax Commission's endeavor to get at all of the facts in the case and to give plaintiff a full and complete hearing upon its contentions in regard to the assessment of said tax.

Further answering said complaint of delay, defendants say that said allegations concerning said delay, standing alone or in connection with any other allegations in said petition, do not entitle plaintiff to the relief prayed for nor to any relief whatever.

(2) Defendants deny that said State Tax Commission ignored the provisions of said franchise tax act in assessing said tax, or that said Tax Commission assessed "said tax not only upon the outstanding capital stock of plaintiff employed in this State, but also upon the entire gross assets and property of plaintiff employed within the State," but allege as a fact that said Tax Commission assessed said tax upon the par value of the outstanding capital stock of plaintiff employed in business in this State, plus the excess or overplus of assets and property employed in this State over and above the par value of said outstanding capital stock employed in business in this State.

(3) Defendants deny that under the provisions of said franchise tax act said tax should have been based "solely upon plaintiff's outstanding capital stock employed in Missouri."

(4) Defendants deny that "said State Tax Commission totally ignored the provisions of said Franchise Tax Act in using as a basis for determining said tax the total value of plaintiff's property and assets employed within the State of Missouri without deducting therefrom or considering the plaintiff's indebtedness and liabilities."

38 (5) Defendants deny that said Tax Commission assessed a "property tax upon plaintiff's property rather than a franchise tax upon its right to do business in this State as provided in said act."

(6) Defendants deny that said Tax Commission "totally failed to carry out the intention and purpose of the Legislature in enacting said Franchise Tax Act, in that it failed to give to the term 'surplus,'

as used in said act, the common, usual and ordinary acceptation thereof intended by said Legislature"; and assert that in assessing said tax they interpreted the term "surplus" in the sense in which it was intended in said act and as it was interpreted and construed by the Supreme Court of the State of Missouri in the recent case of *State ex rel. Marquette Hotel Investment Company, relator, v. The State Tax Commission*, No. 21870, Court en banc, decided April 9, 1920.

(7) Defendants deny "that said State Tax Commission measured the tax of said other corporations, or some thereof, by their outstanding capital stock employed in this State and by their surplus employed in this State, giving the terms 'surplus' the correct meaning thereof, to-wit, the excess of assets over liabilities"; but, on the contrary, defendants allege that said State Tax Commission adopted and applied the same method and principle of computation and assessment of said tax to plaintiff and all other railroads and members of said class of corporations coming within the terms of said act.

(8) Defendants further say that if it were true that said Tax Commission had erroneously assessed the tax against one or more corporations, such failure on the part of said State Tax Commission to properly assess other corporations would constitute no defense to an assessment made against plaintiff when such assessment was in accordance with the provisions of the act imposing such tax, and that said allegations, even if true, relating thereto, whether standing alone or taken in connection with any or all of the facts alleged in said petition, would not entitle plaintiff to the relief prayed or to any relief whatever.

(9) Answering paragraph 15 of plaintiff's petition, defendants deny that a large number of reports filed by other corporations failed to contain statements as to the value of such corporations' property and assets in this State, and that said State Tax Commission determined the amount of the franchise tax to be paid by such corporations by the amount of their outstanding capital stock employed in this State, and thereby discriminated against other corporations, including plaintiff. On the other hand, defendants allege that all reports filed by such corporations contained statements as to the values of such corporations' property and assets in this State; that said reports were sworn to, and that said Tax Commission accepted said reports, as true, as under the law it had the right to do, and assessed the tax upon the reports so made by such corporations; that whenever it came within the knowledge of said

(10) State Tax Commission that any corporation, railroad or otherwise, had reported its outstanding capital stock as and for its property and assets, or had in any particular made an erroneous report, then said State Tax Commission immediately took up such matter and required such corporation to make a correct and true report, and in all instances diligently and faithfully sought to assess said tax impartially and correctly, basing such tax upon the par value of such corporation's outstanding capital stock

and excess or surplus of assets over and above such par value outstanding capital stock employed in business in this State; that at no time did said State Tax Commission knowingly use a capital stock basis in the assessment of said tax against any railroad corporation doing business in this State and similarly situated as plaintiff, as alleged in said paragraph 15 of said petition; and defendants deny that said Tax Commission "well knew from its own records that the property and assets of such corporations employed in this State were largely in excess of the amounts shown in said reports."

Defendants, further answering said paragraph 15 of said petition, allege that the matters and things therein stated, even if true, whether standing alone or taken in connection with any or all of the facts alleged in said petition, would furnish no basis for the relief prayed for in plaintiff's petition, or for any relief whatever.

Defendants, further answering said paragraph 15, aver that said matter is impertinent and irrelevant to the issue of the tax assessed against plaintiff, and should be stricken out.

15. Answering paragraph 16 of plaintiff's petition, defendants admit that this suit involves the Constitution and laws of the United States, and the amount in controversy, exclusive of interest and costs, and exceeds the sum of five thousand dollars (\$5,000.00), as alleged in paragraph 16 of said petition.

16. Answering paragraph 17 of plaintiff's petition, defendants deny that said tax was wrongfully and unlawfully assessed against plaintiff or that same was illegal and void; or that the manner of assessing and determining same amounted to an infringement of plaintiff's constitutional rights, as alleged therein, or that, in the determination and assessment of said tax, plaintiff was wrongfully and unlawfully discriminated against and other corporations favored; deny that said tax constitutes a cloud upon the title to plaintiff's property which plaintiff is entitled to have removed by these proceedings or that plaintiff is without adequate remedy at law or will suffer irreparable damages; but admit that defendants will, for the enforcement of said tax, take the steps in said paragraph alleged unless restrained by this court.

Wherefore, having made a full answer to all the matters and things contained in the petition, these defendants pray that
42 - the petition be dismissed, and that defendants have judgment for their costs in this behalf incurred.

FRANK W. McALLISTER,
Attorney General of Missouri;
JOHN T. GOSE,
Assistant Attorney General of Missouri,
Solicitors for Defendants.

43 Afterwards, on the 30th day of June, A. D. 1920, the following further proceedings were had in said cause, to-wit:

In Equity. No. 15.

ST. LOUIS SAN FRANCISCO RAILWAY COMPANY, Complainant,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of Missouri, and Frank W. McAllister, Attorney General of Missouri, Defendants.

Now, on this day is filed the opinion of the Court, on the hearing of the application for an interlocutory injunction and there is also filed for record, an order of court, as follows, to-wit:

In the District Court of the United States for the Central Division of the Western District of Missouri.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Order.

Now, on this day, this cause coming on to be heard upon an application for interlocutory injunction before the undersigned, organized as a court to hear said application, pursuant to the provisions of Section 266 of the Judicial Code of the United States, and the court having heard the evidence and arguments of counsel, and having read and considered the exhibits and briefs filed, and being fully advised in the premises,

It is ordered and adjudged that the interlocutory injunction prayed be and the same is denied.

June 28th, 1920.

KIMBROUGH STONE,

United States Circuit Judge.

ARBA S. VAN VALKENBURGH,

United States District Judge.

MARTIN J. WADE,

United States District Judge.

Opinion.

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

ST. LOUIS, SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Opinion.

Per Curiam:

This case came on for hearing upon an application for a temporary injunction, before Kimbrough Stone, Judge of the Circuit Court of Appeals of the Eighth Judicial Circuit, Arba S. Van Valkenburgh, Judge of the District Court of the United States for the Western District of Missouri, and Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa.

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and is a resident and citizen of said state.

Defendant George H. Middlekamp is the Treasurer of the State of Missouri, and Frank W. McAllister is the Attorney General of said State.

(1) By this petition in equity, the plaintiff challenges the validity and constitutionality of a certain Act of the Legislature of the State of Missouri, approved April 9, 1917, which Act provides for a "franchise tax" upon every corporation organized under the laws of the State of Missouri equal to $3/40$ of one per cent of the par value of such corporation's outstanding capital stock and surplus; or if part of its capital stock is employed in business in another State or country, a tax equal to $3/40$ of one per cent of its capital stock employed in the State of Missouri. Provision is also made for payment of a like tax by corporations not organized under the laws of the State, but doing business within the State. The details of the Act will be hereafter more fully referred to.

45 (2) The Nature of This Tax.—A careful reading of the entire statute convinces us that the tax provided for, is an excise tax—not a property tax. This is apparent not only from the language used, but from the further fact which appears of record that the State of Missouri before this enactment by the legislature imposed taxes upon property tangible and intangible, including the value of franchises, such as the right of way, depot grounds, etc.

We cannot assume that the legislature, by this Act, intended to impose additional burdens upon the property of the plaintiff.

Furthermore, the Supreme Court of Missouri, construing this Missouri statute (State of Missouri *ex rel* vs. The State Tax Commission, et al., filed April 9, 1920, and *id.*, upon rehearing, filed May 18, 1920, specifically holds that this Act does not provide for a property tax. It is designated as a "franchise tax," which as applied herein, we think is better described as an "excise tax." This term avoids confusion with the tax properly levied upon franchises as property. The construction by the Supreme Court of Missouri of the language of the legislature of Missouri, should not only be followed by this court, but we concur with the views of the Supreme Court of Missouri in the construction which they have placed upon the language of the Act. It is quite apparent that the legislature in good faith, attempted to impose an excise tax.

(3) There can be no question about the power of the legislature of Missouri to impose such an excise tax. The existence of such power, and the right to exercise such power, has been repeatedly sustained. *Shaffer v. Carter*, 10 Sup. Ct. 221, (decided March 1, 1920) in which it is said—

"In our system of government the States have general dominion, and save as restricted by part, peculiar provisions of the Federal Constitution, complete dominion over persons, property and business transactions within their borders, they assume and perform the duties of preserving and protecting all such persons, property, and business, and in consequence have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises."

"Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and vocations by which the citizens acquire a livelihood, may be taxed by the State for the support of the State government. Authority

to that effect resides in the State independent of the Federal Government." *Society for Savings vs. Coite*, 6 Wallace, 594; 18 L. Ed. 897. Quoted and approved. *Flint v. Stone Tracy Co.*, 220 U. S. 107-161; 55 L. Ed. 389.

(4) Missouri having the power to impose an excise tax upon the plaintiff, and having in fact imposed an excise tax—not a property tax, the next question, and practically the only question remaining is, whether in fixing the measure of such tax, the method by which the amount of such tax should be determined, the legislature has violated any of the rights of the plaintiff under the Constitution of the United States, or the Constitution of the State of Missouri.

Of course there must be some measure by which the amount of an excise tax must be determined, and this measure must be practical.

"The tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations." *Flint v. Stone Co.*, *supra*, at page 165."

(5) The State of Missouri cannot impose any obligation or burden upon interstate commerce; but under the requirements of the statute in controversy, we cannot agree with counsel that the legislature has in any manner imposed any such burden. It is true, of course, that the plaintiff being engaged in interstate commerce and intrastate commerce, its income is composed in part of proceeds of interstate commerce; but this, under numerous decisions of the Supreme Court of the United States, does not invalidate the tax. Justice Pitney in the recent case of *Shaffer v. Carter*, *supra*, says:

"It is urged that, regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in *Crew Co. v. Pennsylvania*, 245 U. S. 292; 38 Sup. Ct. 126; 62 L. Ed. 295; but only upon the net proceeds, and is plainly sustainable, even if it includes net gains from interstate commerce. *U. S. Glue Co. v. Oak Creek*, 247 U. S. 221; 38 Sup. Ct. 499; 62 L. Ed. 1135."

In *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, it is said:

"The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. It is the commerce itself which must not be burdened by State exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the state, has been sustained."

In *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, Justice Pitney says:

"This, however, does not mean, as is contended, that because of the Fourteenth Amendment a State may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the State, including that employed in interstate commerce."

He further says: "It is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use."

Justice Hughes in *Kansas City, Fort Scott & Memphis Railway Company v. Kansas*, 240 U. S. 227, expresses the same view in the following language:

"It is also manifest that the state is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce."

Justice Hughes further says:

"The selected measure may appear to be simply a matter of convenience in computation, and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority."

He then refers to the Baltic case, and says—

"If the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

Justice Day in *Kansas City Co. v. Stiles*, 242 U. S. 111, concurs in the views of Justice Hughes, and says:

"The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital, in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character."

Further quotation would seem to be unnecessary, though the almost unlimited power of the state in the field of taxation, is well illustrated in numerous recent cases. See *Fort Smith Lumber Co. v. State of Arkansas*, 40 Sup. Ct. 304, *Askren, Attorney General v. Continental Oil Co. et al.*, 40 Sup. Ct. 355, *Maxwell v. Bugbee*, 40 Sup. Ct. 2, *Baldwin Tool Works, et al. v. Blue*, 240 Fed. 202, *N. W. Mutual Life Insurance Co. v. State of Wisconsin*, 247 U. S. 132; 62 L. Ed. 1025.

(6) Other Non-taxable Property.—It is here suggested that the Act permits the inclusion for taxation of property beyond the limits of the state, which is not subject to taxation in the State of Missouri.

"But this argument confuses the measure of the tax upon the privilege, with direct taxation of the estate or thing taxed. * * * Where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the state or nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such, and to measure a legitimate tax upon the privileges involved in the use of such property."

"It is no objection that the measure of taxation is found in the income produced in part from property, which of itself considered is non taxable."

"It is no valid objection that this measure includes in part at least, property which as such, could not be directly taxed." *Flint v. Stone Tracy Co.* *Supra.*

The Act complained of in this case measures the tax by "the par value of its capital stock and surplus employed in business in this State." To determine this it provides—

"Such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus, that to property and assets in this state bears to all its property and assets wherever located."

This language obviously contemplates property not only within the state, but used in business transacted within the state. It is true that the standard provided may not operate with absolute justice, equality and exactness, but it is fairly and reasonably intended so to do.

As there are between fourteen and sixteen thousand corporations in Missouri subject to this tax, which must be calculated and assessed annually, it would be impracticable to compel methods requiring exactness. The basis of such measurement must for practical reasons be such as may be readily applied. Such a practical rule exceeds no constitutional limitation, for it honestly endeavors to provide a method which is not obviously unwarranted and arbitrary.

(7) Alleged Discrimination in Violation of the Constitution of the United States and the Constitution of Missouri.—We find no justification for alleged discrimination in violation of the Constitution of the United States, or the Constitution of Missouri. *Northwestern Mutual Life Insurance Co. v. State of Wisconsin*, *supra*, clearly sustains the right of the legislature to impose different rates and different methods of taxation upon "old line" Insurance Companies, Fraternal Insurance Companies, religious and educational corporations and associations.

In *Baldwin Tool Works et al. vs. Blue*, *supra*, the opinion of Circuit Judges Prichard and Woods and District Judge Waddill, disposes of many of the questions of discrimination alleged by the plaintiff in this case.

In *Flint v. Stone Tracy Co.* *supra*, the Supreme Court of the United States, says:

"In levying excise taxes, the most ample authority has been recognized from the beginning, to select some and omit other possible subjects of taxation; to select one calling, and omit another, to tax one class of property and forbear to tax another." And the court in the margin sets forth many different cases illustrative of this power to impose an excise tax upon any and every line of business. Of course upon the same line of business substantial equality is required; while a state might impose a tax upon a pool hall, it could not arbitrarily impose a higher tax upon one pool hall than upon another. A state might impose an excise tax upon theaters or

Motion Picture Houses, but such tax would not be invalid, because it varied from the tax imposed upon a pool hall.

Taxation is equal when the tax is substantially the same upon all persons or corporations engaged in the same line of business, but there is not inequality when the legislature imposes a certain excise tax upon all corporations organized and operating for pecuniary profit, and exempts from such tax, corporations organized for religious or educational purposes only; nor is there inequality because the legislature chooses to impose a different method of taxation upon Express Companies.

In *Bell's Gap Co. v. Pennsylvania*, 134 U. S. 232, it is said:

"The provision in the 14th Amendment that no state shall deny to any person within its jurisdiction, the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses exempt certain classes of property from any tax at all—such as churches, libraries, and the property of educational institution. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. It may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money, etc."

This quotation was approved in the *Flint v. Stone* case *supra*. See also *Armour & Co. v. Commonwealth of Virginia*, 246 U. S. 1, 27 L. Ed. 547.

See also *Maxwell v. Bugbee*, *supra*, in which Justice Day gives extended discussion to the 14th Amendment in relation to inheritance taxes imposed by the state.

(8) The Alleged Violation of Contract by the State of Missouri.—We cannot concur in the contention that because this corporation paid the fees imposed by the state upon its organization, it thereby acquired perpetual exemption from payment of excise tax. We find no such purpose indicated in the law of Missouri by which the plaintiff was authorized to incorporate. *Central of Georgia Ry. Co. vs. Wright*, 40 Sup. Ct. 1.

(9) The meaning of the word "surplus," used by the legislature in fixing the measure by which the tax shall be computed, has already been determined by the Supreme Court of Missouri, in *State Ex Rel. Marquette Hotel Investment Co. v. State Tax Commission et al.*, *supra*. This construction of this state statute is binding upon this court. We may say, however, that in our present view, the construction of the Supreme Court of Missouri, is correct.

(10) Other questions have been discussed by counsel, but in our view the foregoing disposes of all points necessary to a final determination of this case.

The petition recites that the assessment made by the State Tax

Commission, was based entirely upon the report made by the plaintiff. The petition recites that "said State Tax Commission did thereupon find the facts to be as stated in said written report theretofore filed with said State Tax Commission by plaintiff, except as to the item of surplus, and that plaintiff was liable to pay under the provisions of said franchise tax, as a franchise tax, for said year ending December 31, 1919, the sum of \$92,119.99."

Therefore, holding as we do, that the enactment of the legislature is valid and that the word "surplus" was properly construed by the Tax Commission, it is our duty to deny the temporary injunction, and it is so ordered.

KIMBLEOUGH STONE,

U. S. Circuit Judge.

MARTIN J. WADE,

U. S. District Judge.

ARBA S. VAN VALKENBURGH,

District Judge.

51. Afterwards on the 12th day of July, A. D. 1920, the following further proceedings were had in said cause, to wit:

In Equity. No. 15.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Complainant,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of Missouri, and FRANK W. McALLISTER, Atty' General, Defendants.

Now on this day comes the complainant and file a motion for a rehearing on its application for injunction.

52. In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Motion for Rehearing.

Comes now the plaintiff and moves the Court for a reconsideration of plaintiff's application for a temporary injunction in the above cause, and that it be granted a rehearing thereof, for the following reasons, to-wit:

First. Because the Court finds that the Act of the Legislature of the State of Missouri approved April 9, 1917, provides for a franchise or excise tax and not a property tax, but fails to consider Sections 11551 and 11552 Revised Statutes of the State of Missouri, 1909, as construed by the Supreme Court of the State of Missouri in the case of State, ex rel. vs. Wiggins Ferry Company, 208 Mo., 622, and in the case of State, ex rel. vs. Roach, 267 Mo., 390, and thereby erred in not finding that said franchise tax of April 9, 1917, *supra*, constituted double taxation against plaintiff and its property, and deprives plaintiff of its property without due process of law, and denies it the equal protection of the laws, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

53 Second. Because the court finds that the Act of the Legislature of the State of Missouri approved April 9, 1917, provides for a franchise or excise tax and not a property tax, but fails to find that during the period for which the franchise tax in question was assessed, and ending December 31, 1919, the plaintiff was not engaged in business in the State of Missouri, owing to governmental intervention, and was not exercising any franchise or excise right for which the alleged tax in question was assessed, and therefore is not liable for or obligated to pay such franchise tax under the repeated adjudications of the Courts, to-wit:

State of Ohio vs. Harris, 229 Fed., 892;

Public Service Railway Co., et al. vs. Herold, 229 Fed., 892.

and cases therein cited, and that the Court erred in failing to so find and decree; that by reason thereof plaintiff does not owe said franchise tax in question in the sum of \$92,119.59, or any sum whatever, and by reason of the Court's failure so to find the plaintiff is deprived of its property without due process of law and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Third. Because the Court erred in not finding that plaintiff has property and is engaged in business wholly inter-state in character, as in the case of large and valuable supplies and equipment used solely in interstate commerce and transportation between various stations adjacent to State lines and points beyond State lines, which said property and the proceeds and earnings derived therefrom and from such interstate transportation, are evidenced in and represented by the capital stock of plaintiff employed in the State of Missouri, whereby such commerce, exclusively interstate, is taxed under the provisions of said franchise Act, *supra*, approved April 9, 1917, and that by reason thereof said Act is unconstitutional and void and violative of

Section 8 of Article I of the Constitution of the United States
54 investing Congress with power to regulate commerce among the several states, and as is declared in *Leloup vs. Port of Mobile*, 127 U. S., 640; *Myer vs. Wells Fargo & Company*, 223 U. S.,

298; Ludwig vs. Western Union Telegraph Company, 216 U. S., 146; and Western Union Telegraph Company vs. Kansas, 216 U. S., 1.

Fourth. The Court erred in holding that in construing the word "surplus" as found in said franchise tax Act, *supra*, approved April 9, 1917, it was bound by the construction thereof by the Supreme Court of the State of Missouri in the case of State, ex rel., Marquette Hotel Investment Company vs. State Tax Commission, et al., (221 S. W. 721) in that at the time the transactions involved in this controversy arose, and while this case was under the consideration of this Court, there had not been a final determination of the cause aforesaid by the Supreme Court of the State of Missouri, by reason whereof this court was entitled and it was its duty to exercise an independent jurisdiction and judgment as to the meaning and effect of the Act aforesaid and of each and all of the terms thereof, and the adjudications of the Courts of Missouri, with respect to said subject matter, not having become rules of property in the State of Missouri, authorized this Court and it became and was its duty to exercise its independent judgment as to the meaning of said franchise tax Act and the terms thereof as has been repeatedly adjudicated by the Federal Courts, among which decisions are

United States, ex rel., Pierce, vs. Gargill, County Assessor, 263 Fed., 856;
Burgess vs. Seligman, 107 U. S., 20;
Kuhn vs. Fairmount Coal Co., 215 U. S., 349;

that the Court erred in not finding that the word "surplus" in the franchise tax Act, *supra*, denotes the excess of the assets of corporations involved over liabilities, except liability to shareholders on shares of stock held by them, as was the ruling in the dissenting opinion in the case of State, ex rel., Marquette Hotel Investment Co. vs. State Tax Commission, 221 S. W. 727, and the various cases therein cited in support thereof.

55 Fifth. That the Court erred in denying plaintiff a temporary injunction upon each and all of the grounds therefor set forth in plaintiff's petition herein.

And of the matters herein the plaintiff prays the judgment of the Court.

W. F. EVANS,
E. T. MILLER,
GUTHRIE, CONRAD & DURHAM,
Atty's for Plaintiff.

56 Afterwards, on the 21st day of July, A. D. 1920, the following further proceedings were had in said cause, to-wit:

Now on this day is filed for record an order of Court signed by Hon. Kimbrough Stone, United States Circuit Judge, as follows, to-wit:

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiffs,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Order.

Upon full consideration, the motion for rehearing of the order denying a preliminary injunction is denied.

KIMBROUGH STONE,
Presiding Judge.

57 In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Petition for Appeal.

The above named plaintiff, feeling itself aggrieved by the decree made and entered in this cause on the 28th day of June, A. D. 1920, does hereby appeal from said decree or order to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States sitting at Washington, District of Columbia, and your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made and that pending said appeal that the injunction prayed for by the plaintiff in the above entitled cause be restored and continued in full force.

W. F. EVANS,
E. T. MILLER,
H. S. CONRAD,
Solicitors for Plaintiff.

58 Afterwards, on the 23rd day of August, A. D. 1920, the following further proceedings were had in said cause to-wit:

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Complainant,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of Mo., and FRANK W. McALLISTER, Attorney General, Defendant.

Now on this day the following papers are filed, to-wit: Petition for Appeal, assignment of errors, order granting appeal, appeal bond, order extending time for filing transcript for appeal, praecipe for transcript.

The order granting appeal is in words and figures following to-wit: In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Order Granting Appeal.

Now on this day the petition of plaintiff for an appeal in the above entitled cause is granted and the appeal allowed upon the plaintiff giving bond conditioned as required by law in the sum of One Thousand Dollars.

KIMBROUGH STONE.

Bond for Appeal.

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,
v.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri,
and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Bond for Appeal.

Know all men by these presents, that we, St. Louis-San Francisco Railway Company, as Principal, and United States Fidelity and Guaranty Company of Maryland, as Surety, acknowledge ourselves to be jointly indebted to George H. Middlekamp, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Appellees in the above cause, in the sum of One Thousand (\$1,000) Dollars, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents:

Whereas, on the 28th day of June, 1920, in the District Court of the United States within and for the Central Division of the Western District of Missouri, in a suit pending in that Court wherein St. Louis-San Francisco Railway Company was plaintiff and George H. Middlekamp, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, were defendants, a decree was rendered against the said St. Louis-San Francisco Railway Company, and the said St. Louis-San Francisco

60 Railway Company having obtained an appeal to the Supreme Court of the United States and filing a copy thereof in the office of the Clerk of said Court to reverse said decree and a citation directed to said defendants citing and admonishing them to be and appear at a Session of said Supreme Court of the United States to be held at the City of Washington, District of Columbia, on the — day of — next.

Now the condition of the above obligation is such that if the said St. Louis-San Francisco Railway Company shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.]

ST. LOUIS-SAN FRANCISCO RAILWAY
COMPANY.

By T. A. HAMILTON,

*Its Vice-President,
Principal.*

Attest:

L. O. WILLIAMS,

*Asst. Secretary.*UNITED STATES FIDELITY AND
GUARANTY COMPANY OF MARY-
LAND,

By T. F. BROWNE,

*Its Atty.-in-Law,
Surety.*

Attest:

*_____,
Secretary.*

Approved:

KIMBROUGH STONE,

Judge.

61

*Assignment of Errors.*In the District Court of the United States within and for the Central
Division of the Western District of Missouri.

In Equity. No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri,
and Frank W. McAllister, Attorney General of the State of Mis-
souri, Defendants.*Assignment of Errors.*

And now on this 20th day of August, 1920, comes the plaintiff and says that the decree entered in the above cause on the 28th day of June, 1920, is erroneous and unjust to the plaintiff, in the following particulars:

1. Because the court finds that the Act of the Legislature of the State of Missouri, approved April 9, 1917, provides for a franchise or excise tax and not a property tax, but fails to consider Sections 11551 and 11552, Revised Statutes of the State of Missouri, 1909, as construed by the Supreme Court of the State of Missouri in the case of State ex rel. vs. Wiggins Ferry Co., 208 Mo., 622, and in the case of State ex rel. vs. Roach, 267 Mo., 300, and thereby erred in not finding that said franchise tax approved April 9, 1917, supra, constituted double taxation against plaintiff and its property and deprives plaintiff of its property without due process of law, and denies it the equal protection of the laws, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

2. Because the court finds that the Act of the Legislature of the State of Missouri approved April 9, 1917, provides for a franchise or excise tax and not a property tax, when in truth and in fact the same is a property tax and the enforcement of said tax constitutes double taxation against plaintiff and its property and deprives it of its property without due process of law, in violation of Section 3 of Article X of the Constitution of the State of Missouri, and that the failure of the Court to consider Sections 11551 and 11552 of the Revised Statutes of the State of Missouri, 1909, as construed by the Supreme Court of the State of Missouri in the case of State ex rel. vs. Wiggins, 208 Mo., 622, and in the case of State ex rel. vs. Roach, 267 Mo., 390, and in not further finding that said franchise tax, *supra*, constitutes double taxation in violation of Section 3 of Article X of the Constitution of the State of Missouri.

3. Because the court finds that the Act of the Legislature of the State of Missouri approved April 9, 1917, provides for a franchise tax or excise tax and not a property tax, but fails to find that during the period for which the franchise tax in question was assessed, and ending December 31, 1919, the plaintiff was not engaged in business in the State of Missouri, owing to governmental intervention, and was not exercising any franchise or excise right for which the alleged tax in question was assessed, and that the court erred in failing so to do and by reason thereof the plaintiff is deprived of its property without due process of law, and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

4. Because the Court erred in not finding that plaintiff has property and is engaged in business wholly interstate in character, as in the case of large and valuable supplies and equipment used solely in interstate commerce and transportation between various stations adjacent to state lines and points beyond state lines, which said property and the proceeds and earnings derived therefrom and from such interstate transportation, are evidenced in and represented by the capital stock of plaintiff employed in the State of Missouri, and in not further finding that commerce wholly interstate handled in Missouri, as well as interstate business with wholly interstate facilities, is evidenced in and represented by the capital stock of the plaintiff employed in the State of Missouri, whereby such commerce, exclusively interstate, transacted within and without the State of Missouri, and wholly within the State of Missouri, is taxed under the provisions of said franchise Act, *supra*, approved April 9, 1917, and that by reason thereof said Act is unconstitutional and void and violative of Section 8 of Article I of the Constitution of the United States investing Congress with power to regulate commerce among the several states.

5. Because the court erred in failing to find that plaintiff does not owe the franchise tax in question in the sum of \$92,119.99, or any sum whatever, and by reason of the court's failure to so find the plaintiff is deprived of its property without due process of law and in

violation of Section 1 of Article XIV of the Amendments of the Constitution of the United States.

6. Because the Court erred in holding that in construing the word "surplus" as found in said franchise tax Act, *supra*, approved April 9, 1917, it was bound by the construction thereof by the Supreme Court of the State of Missouri in the case of *State ex rel., Marquette Hotel Investment Company, vs. State Tax Commission, et al.*, (221 S. W. 721) in that at the time the transactions involved in this controversy arose, and at the time when the State Tax Commission assessed the tax in controversy, and rights became fixed, and while this case was under the consideration of this court and had been submitted to this court for adjudication, there had not been a final determination of the cause aforesaid by the Supreme Court of the State of Missouri by reason whereof this court was entitled to and it was its duty to exercise an independent jurisdiction and judgment as to the meaning and effect of the Act aforesaid, and of each and all of the terms thereof, and the adjudications of the Courts of Missouri with respect to said subject matter not having become rules of property in the State of Missouri, authorized this court and it became and was its duty to exercise its independent judgment as to the meaning of said franchise tax Act and the terms thereof, and the construction to be given the same.

7. Because the court erred in not finding that the word 64 "surplus" in the franchise tax Act, *supra*, approved April 9,

1917, denotes the excess of the assets of corporations involved over liabilities, except liability to shareholders on shares of stock held by them.

8. Because the court erred in its interpretation of the word "surplus" in said franchise tax Act, *supra*, approved April 9, 1917, and in failing to permit this plaintiff to deduct its liabilities from its assets in arriving at its surplus for the year 1919, and thereby subjected this plaintiff to a tax of \$75,900.62 in excess of the tax which should be paid by this plaintiff had the court properly construed the word "surplus" in the said franchise tax Act, *supra*, as denoting the excess of the assets of the plaintiff over its liabilities, excepting liabilities to stockholders on the shares of stock by them held, and thereby deprived plaintiff of property without due process of law, in violation of Section 1 of Article XIV of the Amendments of the Constitution of the United States.

9. Because the court erred in permitting this plaintiff to be taxed under said franchise tax Act approved April 9, 1917, for the year 1919 in a sum in excess of \$16,219.37.

10. Because the court erred in failing to find that the said franchise tax Act approved April 9, 1917, violated Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor deprive any person of property without due process of

law, nor deny any person within its jurisdiction the equal protection of the law in that (a) said franchise tax act sought to be imposed by said Act does not apply to corporations not organized for profit nor to express or insurance companies, (b) neither does it apply to any corporation having no capital stock but a large surplus, whether such corporations be domestic or foreign doing business in the State of Missouri, (c) and does not apply to corporations engaged in the same class of business in the State of Missouri, whether 65 domestic or foreign corporations having no capital stock, although said corporations having no capital stock have all the rights and privileges of doing business in the State of Missouri given to corporations having a capital stock and employing their property and assets in the State of Missouri as like effect as corporations having a capital stock, and said franchise Act does not require corporations having no capital stock to report to the State Tax Commission of the State of Missouri the amount of said corporations' surplus and undivided profits, the nature and kind of its business, the clear market value of its property and assets in this State or without this State, or the clear market value of its total surplus, property and assets, nor does the said Act require said corporations having no capital stock to pay any franchise tax based upon or determined by their assets, property, surplus and undivided profits employed in the State of Missouri.

11. Because said franchise tax Act is unconstitutional and void in that it violates Section 10 of Article I of the Constitution of the United States which provides that no State shall pass any laws impairing the obligation of contracts, for the reason that said act impairs the contract made between the State of Missouri and plaintiff under and by virtue of which plaintiff for a certain consideration paid by it to said State, was granted the contractual right to engage in and transact business in said State, the consideration so paid by plaintiff being based upon and determined by the amount of plaintiff's capital stock, the amount so paid by plaintiff being in excess of \$225,025.00.

12. Because said franchise tax Act is unconstitutional and void in that it violates the Constitution of the State of Missouri, and particularly the following provisions thereof, to-wit:

66 (a) Section 2 of Article X which provides that the power to tax corporations and corporate property shall not be surrendered or suspended by act of the General Assembly in that said Act attempts to surrender the power to tax certain classes of corporations and certain corporations of the same class doing business in Missouri, especially referred to in said Act, and the property of such corporation.

(b) Section 3 of Article X which provides that the tax shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, in that the tax sought to be imposed thereby upon certain corporations of the same class is entirely differ-

ent in nature and amount from the tax sought to be imposed thereby upon other corporations of the same class, and certain corporations of the same class are entirely excepted and relieved from the imposition of the tax, and in that said tax constitutes double taxation upon plaintiff's right to do business in this State.

(c) Section 4 of Article X whereby it is provided that all property subject to taxation shall be taxed in proportion to its value, in that the tax sought to be imposed by the Act upon certain corporations for the privilege of doing business in this State is entirely different in nature and amount from the tax sought to be imposed upon other corporations of a like nature and of the same class doing a similar or the same business in this State.

(d) Section 53 of Article IV of the Constitution which provides that the General Assembly shall not pass any local or special law granting to any corporation, association or individual any special or exclusive right, in that said Act expressly excludes from the operation and burden thereof certain domestic corporations doing business in this State and certain foreign corporations doing business in this State, in that said corporations are permitted to transact business in this State without being subject to the same burdens as plaintiff.

(e) Section 7 of Article X whereby all laws exempting property from taxation other than the property enumerated in Section 6 of Article X are declared to be void, in that said Act attempts to exempt all classes of corporations not organized for profit, express companies and insurance companies, domestic corporations having no capital stock doing business in this State, and for foreign corporations having no capital stock and doing business in the State.

13. Because the State Tax Commission referred to in said franchise Act approved April 9, 1917, *supra*, in assessing the tax in controversy against plaintiff, wrongfully and unlawfully, grossly discriminated against plaintiff and in favor of other corporations, including other railroad corporations, doing business in the State of Missouri, in that said State Tax Commission measured the tax of said other corporations, or some thereof, by their outstanding capital stock employed in this State and by their surplus employed in this state, giving the term "surplus" the meaning contended for by plaintiff but not upheld by this court, to-wit, the excess of assets over liabilities.

14. Because the court erred in not granting the relief prayed for by the plaintiff herein.

15. Because the court erred in denying the injunctive relief prayed for by the plaintiff herein.

Wherefore, the plaintiff prays that said decree be reversed and the District Court directed to grant the relief prayed for by plaintiff and to enter such decree as is prayed for by plaintiff's bill herein.

W. F. EVANS,
E. T. MILLER,
H. S. CONRAD,
Solicitors for Plaintiff.

68 In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Now on this day upon application of the plaintiff, the court being fully advised, grants the plaintiff until on or before September 20, 1920, in which to file its transcript for appeal.

KIMBROUGH STONE,
Judge.

69 In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Precept for Transcript.

To E. R. Durham, clerk:

You will please prepare transcript of record in the above cause for filing in the Supreme Court of the United States and insert in same the following:

1. Complainant's petition or bill of complaint.
- 1½. Answer.
2. Condensed form of evidence filed in pursuance of Equity Rule No. 75.

3. Decrees.
4. Motions for re-hearing.
5. Order overruling motion for a re-hearing.
6. Petition for appeal.
7. Assignment of errors.
8. Order allowing appeal.
9. Bond.
10. Citation and service.
11. All record entries.
12. Election as to printing.
13. Precipe for transcript.
14. All exhibits introduced in evidence in said cause.

W. F. EVANS,
E. T. MILLER, AND
H. S. CONRAD,

Solicitors for Plaintiff.

70 Afterwards on the 27th day of August, A. D. 1920, the
Citation in this cause was filed in the clerk's office, as follows:
to-wit:

Citation.

In the District Court of the United States within and for the Central
Division of the Western District of Missouri

In Equity. No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

George H. Middlekamp, State Treasurer of the State of Missouri,
and Frank W. McAllister, Attorney General of the State of Mis-
souri, Defendants.

United States of America to George H. Middlekamp, State Treasurer
of the State of Missouri, and Frank W. McAllister, Attorney Gen-
eral of the State of Missouri, Greetings:

You are hereby notified that in a certain cause in equity in the
District Court of the United States within and for the Central Division
of the Western District of Missouri wherein St. Louis-San Francisco
Railway Company is plaintiff and George H. Middlekamp, State
Treasurer of the State of Missouri, and Frank W. McAllister, At-
torney General of the State of Missouri, are defendants, an appeal

has been allowed the plaintiff therein to the Supreme Court of the United States sitting at Washington, District of Columbia.

You are hereby cited and admonished to be and appear in said court in thirty (30) days after the date of this citation to show cause if any there be, why the order and decree appealed from shall not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Kimbrough Stone, Judge of the District Court of the United States within and for the Central Division of the Western District of Missouri this 29th day of August, 1920.

KIMBROUGH STONE,

Judge.

Due, timely and legal service of the above citation is accepted and receipt of copy thereof acknowledged at Jefferson City, Missouri, this 23rd day of August, 1920.

FRANK W. McALLISTER,

Attorney General,

Solicitors for Defendants.

II. *Motion to Continue Injunction in Force, Pending Appeal.*

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Comes now plaintiff and prays that pending the appeal heretofore granted in this cause, the order and injunction prayed for by plaintiff in the above entitled cause be restored and continued in full force.

W. F. EVANS,

E. T. MILLER,

H. S. CONRAD,

Solicitors for Plaintiff.

72 Afterwards on the 9th day of September, A. D. 1920, the following further proceedings were had in said cause, to-wit

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Complainant,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer, and FRANK W. McALLISTER, Attorney General, Defendants.

Now on this day is filed a motion by complainant that the Injunction prayed be restored and continue in force, pending the appeal heretofore granted. Complainant also files its election to have the Clerk of the Supreme Court of the United States print the record in this cause.

73 In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. --.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Comes now St. Louis-San Francisco Railway Company above named and files its election to have the Clerk of the Supreme Court of the United States print the record in said cause for use in said Supreme Court in accordance with the rules provided.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

By W. F. EVANS,
E. T. MILLER,
H. S. CONRAD,

Its Solicitors.

74 Afterwards, on the 20th day of September, A. D. 1920, the following further proceedings were had in said cause, to-wit:
Now on this day is filed an order of court, signed by Hon. Arba S. Van Valkenburgh, Judge, as follows, to-wit:

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and FRANK W. McALLISTER, Attorney General of the State of Missouri, Defendants.

Now on this day upon application of the plaintiff, the court, being fully advised, extends the time until on or before the 29th day of October, 1920, in which to file its transcript for appeal.

ARBA S. VAN VALKENBURGH,
District Judge.

Afterwards, on the 12th day of October, A. D. 1920, the following further proceedings were had in said cause, to-wit:

No. 15. (In Equity.)

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Complainant,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of Missouri, and FRANK W. McALLISTER, Attorney General, Defendants.

Now on this day is filed a statement of the evidence taken at the trial, in condensed form, as required by the Rules 75, Equity Rules.

Afterwards, on the 16th day of October, A. D. 1920, the following further proceedings were had in said cause, to wit:

Now on this day is filed for record, an order of Court, signed by Hon. Kimbrough Stone, Circuit Judge, and Hon. Arba S. Van Valkenburgh, District Judge, as follows to-wit:

In the District Court of the United States within and for the Central
Division of the Western District of Missouri.

(In Equity. No. 15.)

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri,
and Frank W. McAllister, Attorney General of the State of Mis-
souri, Defendants.

Now on this day upon application of the plaintiff, the court being
fully advised, grants the plaintiff until on or before November 20,
1920, in which to file its transcript for appeal.

ARBA S. VAN VALKENBURGH,
Judge.

KIMBROUGH L. STONE,
Judge.

76. Afterwards, on the 27th day of October, A. D. 1920, the
following further proceedings were had in said cause, to-wit:

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of Missouri, and FRANK W.
MCALLISTER, Attorney General, Defendants.

Now on this day is filed the application of the Complainant to re-
store and continue in force the injunction heretofore granted and ap-
pended the appeal, also an appeal bond; and there is also filed for
record an order of Court, signed by Hon. Arba S. Van Valkenburgh,
Judge as follows, to-wit:

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

(In Equity. No. 15.)

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Order.

Now on this day plaintiff presenting formal application praying that the restraining order heretofore granted in the above entitled cause be restored and continued in full force pending the appeal in said cause, and it appearing that it is agreeable to defendants that said restraining order be restored and continued in force pending appeal.

It is hereby Ordered that the restraining order heretofore granted herein be and the same is hereby restored and continued in force pending the appeal heretofore allowed in this cause.

ARBA S. VAN VALKENBURGH.

77 In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Bond for Appeal.

Know all men by these presents, That we, the St. Louis-San Francisco Railway Company, as principal, and United States Fidelity and Guaranty Company, as surety, acknowledge ourselves to be jointly indebted to George H. Middlekamp, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, appellees in the above cause in the sum of Two Thousand Five Hundred Dollars (\$2,500.00), conditioned, that,

Whereas, on the 28th day of June, 1920, in the District Court of the United States within and for the Central Division of the Western District of Missouri, in a suit pending in that court wherein St. Louis-San Francisco Railway Company was plaintiff, and George H. Mid-

Middlekamp, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, were defendants, a decree was rendered against the said St. Louis-San Francisco Railway Company, and the said St. Louis-San Francisco Railway Company having obtained an appeal to the Supreme Court of the United States and filing a copy thereof in the office of the Clerk of said Court to reverse said decree and a citation directed to said defendants citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be held at the City of Washington, District of Columbia.

Now, if the said St. Louis-San Francisco Railway Company shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

78 Done this 22 day of October, 1920.

ST. LOUIS-SAN FRANCISCO RY. CO.,
By H. S. CONRAD,

Solicitor.

UNITED STATES FIDELITY &
GUARANTY COMPANY.

By W. R. TAYLOR,

Attorney in Fact. [Seal.]

Approved:

ARBA S. VAN VALKENBURGH,
Judge.

79 Afterwards, on the 9th day of November, A. D. 1920, the following further proceedings were had in said cause, to wit:

No. 45. Equity.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Complainant,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of Missouri, and FRANK W. McALLISTER, Attorney General, Defendants.

Now on this day is filed the condensed statement of the evidence as amended in compliance with the order of Court; and there is also filed for record, an order of Court, signed by Hon. Arba S. Van Valkenburgh, Judge, as follows, to wit:

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. 15.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Plaintiff on this day presenting its condensed statement of the evidence, defendants appearing and objecting to the condensation of the testimony of Roy D. Williams, and it appearing to the court that it is desirable that the complete testimony of Roy D. Williams be incorporated in lieu of the condensed testimony of Roy D. Williams, it is

Ordered that the complete testimony of Roy D. Williams be substituted for the condensed statement of his testimony, and said condensed statement so amended, both parties agreeing to the same, is hereby approved.

ARBA S. VAN VALKENBURGH,

District Judge.

80 In the District Court of the United States within and for the Central Division of the Western District of Missouri, at Jefferson City.

No.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

vs.

GEORGE H. MIDDLEKAMP et al., Defendants.

Evidence in Condensed Form.

81 Be it remembered That on the 29th day of April, in the year of Our Lord One Thousand Nine Hundred and Twenty, being one of the regular days of the April, 1920 Term of the United States District Court for the Central Division of the Western District of Missouri, this cause coming on for hearing on the application for a temporary injunction, before the Honorable A. S. Van Valkenburgh, Honorable Kimbrough S. Stone and Honorable Martin J. Wade, United States District Judges, the plaintiff appearing by Messrs. W. F. Evans, E. T. Miller and Henry S. Conrad, and the defendants appearing by Honorable Frank W. McAllister, Attorney General, and Assistant Attorney General Gose, and both parties hereto answering ready, the following proceedings were had, to wit:

Judge Stone: We will now take up this matter of the preliminary injunction of the case of St. Louis and San Francisco Railway Company versus Middlekamp, et al.

Mr. Conrad: The appearances for the plaintiff are W. F. Evans, E. T. Miller and Henry S. Conrad, who will probably be assisted by Mr. Cyrus Crane.

Judge Stone: Is Mr. Crane here?

Mr. Crane: Yes; and if Your Honor, please, I am also appearing for the Atchison, Topeka & Santa Fe Railway Company, if we should file a similar bill in their behalf, and Mr. Samuel W. Sawyer is also appearing.

Mr. Sawyer: If the court, please, with consent of counsel for plaintiff, I am also appearing and I filed this morning in behalf of the Kansas City Terminal Railway Company a similar bill, which

82 Attorney General McAllister now has, and which he is considering now, whether he will stipulate that the evidence filed in this case will be used in that case.

Judge Stone: The bills are quite similar?

Mr. Sawyer: They are all similar except in one minor respect.

Judge Stone: Are there any appearances, General McAllister except yourself on behalf of the State?

General McAllister: Mr. John W. Gose, and Mr. Broaddus, my assistants.

Mr. Conrad: If your honor, please, we desire to amend the petition by adding paragraph 8 of subdivision 14. I presume I ought to have this order signed. (Handing paper to Clerk of court.) That will appear, your honor, at the end of the first paragraph on page 13 of the bill—at the end of paragraph 14 on page 13.

Judge Stone: Where is that to be inserted?

Mr. Conrad: At the end of paragraph 14; it is the second line on page 13 of the bill.

Judge Stone: Are there any answers, or motions, or pleadings to be filed?

General McAllister: No.

On behalf of the plaintiff, Mr. Miller then made an opening statement as follows:

May it please the court, the testimony will be very brief and largely in the form of affidavits, which are short. It might be well if I should state the issues to the court, and before introducing this testimony. In 1917 the Missouri Legislature passed an act, 83 entitled "An act to require domestic corporations and foreign corporations doing business in this State, to pay an annual franchise tax." The Tax is measured by three-fortieths of one per cent as to corporations organized in Missouri and doing business solely in Missouri, of their outstanding capital stock and surplus. A corporation organized in Missouri but doing business in this state and without this State, pays three-fortieths of one per cent on its outstanding capital stock in this state. Foreign corporations pay three-fortieths of one per cent on a basis that is prescribed in the Act;

that is, certain corporations, insurance companies and express companies are excepted.

The State Tax Commission in 1919 assessed a tax against the plaintiff here, the Frisco, which I shall hereafter refer to as the Frisco Company, of \$92,000 for the privilege of doing business in Missouri for the year 1919.

Under the Act, all these corporations subject to the tax are required to report to the State Tax Commission on a form of report prepared by it, and also contained in the Act certain details as to their corporate management and as to their capital stock, surplus, undivided profits, assets and property. These reports are to show the business as of December 31st, in this case, 1918, upon which a tax is to be assessed by the Commission for the year, the calendar year 1919. These reports are to be filed with the Commission by February 1st, 1919. The Commission is to determine from the reports and from any other facts coming to its knowledge, the amount of tax that is to be assessed and the Clerk of the Commission is to

certify this amount to the State Auditor, and the State Auditor makes out a tax bill, sends it to the State Treasurer,

who charges the Company with the amount and it is payable by the 15th of April; it becomes delinquent the 1st of May. If it is not paid by the 1st of May, the Secretary of State—the State Treasurer certifies that bill to the Attorney General and further certifies that the corporation is delinquent, and then the Act makes it the duty of the Attorney General to immediately institute suit, to file suit with a penalty of twenty-five per cent and interest at the rate of one per cent a month on the amount of the tax.

The tax in this instance against the Frisco is \$92,000 and some odd dollars, and the commission arrived at that tax in the following manner. The Frisco's report to the Commission showed that it had outstanding capital stock—and I will use round figures now instead of detailed figures of \$57,000,000; its entire outstanding stock was about \$57,000,000. The amount apportioned to Missouri was \$21,000,000; the value of its property and assets in Missouri, without deducting liabilities was \$122,000,000. It reported that it had no surplus as of December 31, 1918.

The Commission found all of these facts to be true; it limited its findings to the information contained in the report, with this one exception: Where the Frisco reported that it had no surplus, the Commission said that it had a surplus of \$101,000,000, arrived at in this way: The tax goes to the capital stock in the State anyhow; that's \$21,000,000; then the total assets being \$122,000,000 in the State, the Commission deducted the \$21,000,000 capital

stock from the gross assets in this state, and the remainder of \$101,000,000 is surplus, and upon that surplus a tax was assessed at the rate of three-fortieths of one per cent.

Our position is that if the Act was constitutional, and if we were required to pay any franchise tax bill, it is limited to three-fortieths of one per cent of the par value of our outstanding capital stock apportioned to Missouri, which would be about \$16,000. The Act made the tax itself a lien upon all of the property and assets of

the Company in the State and the Act further makes the judgments obtained for the tax, with penalties and interest, a lien upon all the property and assets in the State.

The amount in dispute therefore is approximately \$75,000, the difference between the \$92,000 and the \$16,000 that has been paid, and receipt was issued on payment of this amount by the State Treasurer, protecting the rights of both the State and the other party, to claim any of its legal rights respecting it.

Judge Stone: Now the provisions of your bill cover the illegality, or claimed illegality of prior acts, including—

Mr. Miller (interrupting): Yes; if I may explain that, your honor. My bill attacks the Act itself as being in violation of three provisions of the Federal Constitution, and as being in violation of several statutory or constitutional provisions of Missouri. It also takes the position that if the plaintiff is mistaken in its belief as to the unconstitutionality of the statute, yet the tax was improperly computed in that they used the word "surplus" in a meaning that we will afterwards discuss at length to your honors.

86. Judge Van Valkenburgh: Has that phase of the case not been already decided by the Supreme Court of Missouri?

Mr. Miller: I will come to that. It has, in this way: The Supreme Court of Missouri, in the case of the Marquette Investment Company, a Missouri Corporation versus The Public State Tax Commission, on certiorari from the Supreme Court of Missouri, had this question involved and I will state it very briefly. That Company had a capital stock and property wholly employed in Missouri, and it was a Missouri corporation; the capital stock was \$350,000; the assets were \$350,000—no, the assets were \$700,000. The debts were \$350,000 aside from the stockholdings, and it reported a surplus of \$8,000—seven or \$8,000. The Commission in that case found that all over \$350,000, that is \$358,000, constituted a surplus, and that was the sole question that went to the Supreme Court. It was limited to the meaning of the word "surplus."

The Supreme Court decided that case and held that the word "surplus" was properly interpreted by the State Tax Commission. Motions for rehearing were filed and a large number of interests in Kansas City and in St. Louis have filed briefs on that motion, the Clearing Houses of the two cities, the State Banking Association and the Chambers of Commerce, as I understand, of the two cities, I know of St. Louis, but I do not know as to Kansas City. That motion for rehearing is under consideration now by the Supreme Court of Missouri, therefore the Supreme Court of Missouri has not, as we will be prepared to show, as the question is raised as to that, both by the Federal and State Constitutions, that the definition given to the word "surplus" by the Supreme Court of Mis-

87. souri, is not controlling in any measure upon this court. I believe that states generally what the situation involved is.

Judge Wade: When, in the ordinary course, will this motion for rehearing be passed upon by the Supreme Court?

Mr. Miller: That is problematical, your honor. Sometimes they do not pass upon them for months.

Judge Wade: Have the applications for rehearing been argued?

Mr. Miller: We cannot argue them, but they have been submitted to the court.

General McAllister: If your honors please, the Supreme Court en banc is in session at this time, and that is the purpose of the pleading.

Mr. Miller: Plaintiff first desires to offer in evidence a certified copy of the order of the State Tax Commission of Missouri, dated the 11th day of October, 1919, determining the franchise tax of the plaintiff for the calendar year of 1919, and ask that that be marked Plaintiff's Exhibit 1.

Judge Stone: Let me inquire, what is the general scope of the evidence, toward what points will it be leveled?

Mr. Miller: The evidence will go to show the erroneous interpretation given the word "surplus" by the Commission, from the report of the Commission itself, in determining that tax. The evidence will further show by this affidavit the nature of the Frisco's business, the segregation or non-segregation of its receipts, inter-state and intra-state, and the fact of the payment of all of its proper taxes, including franchise taxes for the year 1919. That will be principally covered by the affidavits.

88 In addition to that we will have evidence showing that this plaintiff was discriminated against by the State Tax Commission in that its franchise tax for the year 1919 is all out of proportion to other corporations of the same class, doing a like business in Missouri. I will give you one particularly, the Missouri Pacific. I think that we will show, although I have not had the opportunity yet to inspect the figures, that have been brought by the State officials, but I think the figures will show the Missouri Pacific showed assets in Missouri greater than the Frisco by \$500,000, a difference say on the basis of \$24,600,000 and \$24,100,000.

Judge Stone: What shows that?

Mr. Miller: The reports, the certified copies of the Acts of the Commission and of the State Board of Equalization of Missouri, in determining the amount of the value of the property of these companies in Missouri; the reports made to the Tax Commission, ours shows \$122,000,000, the Missouri Pacific probably one-third or one-fourth of that amount. Yet the State Tax Commissioners and the State Board of Equalization found, as a matter of fact, that the Missouri Pacific has more assets and property in Missouri than the Frisco has, and it all goes to the construction of this word "surplus" as having a meaning of gross assets. The affidavits and the testimony are so brief that I think possibly I could explain it a little better.

Judge Stone: My purpose in asking the scope of the testimony was this: The members of the court have attempted to familiarize themselves with the bill and also with the law; that is, the statutes of 1917, and it seemed to us that possibly one of the contentions which might be of importance from your viewpoint of

89 this case, would be as to the character of this tax, whether it were really a privilege tax, or whether it were in fact, a license

and property tax, and that the determination of that point might have a very vital bearing upon the character of the testimony which would be produced to the court.

Mr. Miller: Well, this testimony—I think that the tax is a franchise tax, which is of value and is bound to be of value, and is assessed with all other property of the company in the State. Now that's what has 'een done in this instance, and that is one thing we are going to show by these affidavits that it has been given this property value and has been assessed.

Judge Stone: That was intended by the Legislature as a pure license tax and has been administered as a property tax?

Mr. Miller: Yes. The effect of the construction given by the Tax Commission was to impose a property tax on the company's assets in this State.

Judge Stone: Now regarding one branch of the testimony that you indicated—as to other companies. So far as the interpretation to be given the legislative meaning of "surplus," what difference would it make in other cases, provided the Commission had made either the rightful or wrongful application of that term as intended by the law, in the case of the Frisco?

Mr. Miller: Taking the construction given to that term by the Tax Commission, they have clearly discriminated against this plaintiff and in favor of one other company, at least, the Missouri Pacific Company, and I think there are only three railroad companies that are incorporated in this State. They have clearly discriminated against the railway company, in that they had the values of the property of the Missouri Pacific Company before them, showing that they were greater than ours, and yet, with that information before them, they put the tax on us three times as great as they did to the Missouri Pacific Railway, and we offer that to show discrimination.

Judge Stone: Is it your contention that there was a conscious and deliberate discrimination by the Commission?

Mr. Miller: The allegations of our bill on that is, with this information before the Commission, and this Commission not recognizing it and not using it in the ascertainment of the facts, that it amounts to a constructive fraud. The same position was taken in the Green case in the 134 U. S., where the court held there it is constructive fraud.

Judge Stone: Well, in the Green case there was a difference in the ratio of taxation, seventy-two to fifty-five.

Mr. Miller: Now I say it don't make any difference in the rate of taxation, or the basis upon which they assess the tax, if they know the property of the Missouri Pacific is worth \$122,000,000 and they know our property, upon their records is worth \$121,000,000; then if they are going to assess us upon the \$121,000,000, they must assess the Missouri Pacific on the \$122,000,000 and they have discriminated against the Frisco in favor of the Missouri Pacific.

Judge Wade: It will be interesting to find whether it is a franchise tax. Is there noody here claiming it is not a franchise tax to all intents and meaning?

91 **Mr. Sawyer:** In our bill we allege that it is not, in fact, a franchise tax, but is, in essence, a property tax, and that, being a property tax, there is double taxation because the franchises of this company as property are already assessed under Article 11 of Chapter 117, of the Laws of Missouri, and properly, this company having its franchises assessed at some \$2,000,000 and paying some \$47,000 annually as a tax on its franchises and other tangible property. We allege, however, first, in the affirmative, it is claimed to be a franchise tax, and if it is a franchise tax, then the tax is a direct burden on interstate commerce because it is levied against all corporations doing business in the State of Missouri, measured, not by that part of their assets devoted to intrastate business but to that part of their assets employed in the State in all kinds of business, State and interstate. Consequently, the tax is levied on the privilege of doing business—both a State and interstate business; and, therefore, on account of the burdensome amount of the tax, it is a direct burden on interstate commerce. As in the case of International Paper Company vs. State of Massachusetts. That in substance is our position. It possibly is a little different from the manner in which Mr. Miller has stated it, but in the final essence I don't think there's a great deal of difference. But in the Arkansas Bridge case, the difference was, in the Arkansas case the Act was very clear and by its language put a tax on the privilege of doing interstate business. The Act itself made it very clear that the privilege tax was on interstate business only, and the Supreme Court had passed on it and so interpreted it.

92 There is no such interpretation by this court and we say the language of the court shows quite the contrary; that the tax is not for a privilege of doing a State business, but for both State and interstate. And another distinction in the Arkansas Bridge case is that in that case it was also contended in the alternative, that it was double taxation, and the court in that case said that that was a question which might be raised under the State constitution, but they were foreclosed on that issue by the Supreme Court of Arkansas. Again in this case, there is no decision of the Supreme Court of Missouri upholding that tax; there is no decision finding it was double taxation and therefore this court has open to it that alternative.

Judge Wade: Do you want to introduce evidence also as to those issues in your case?

Mr. Sawyer: That will depend upon what arrangement I can make with the Attorney General. I think we will; as I say the bill was just filed this morning. Unless I can hand that to the court later in the form of offers, I would like to have the case heard on the theory that all the evidence would be applicable and material to our case and can be used in our case, and with the privilege of filing affidavits peculiar to our case.

Mr. Miller: We next offer in evidence the receipt from the State Treasurer, dated December 13, 1919, of the payment of \$16,219.37, from the St. Louis-San Francisco Railway. As this is the original receipt and part of our files, I have a copy and I should like permission to withdraw the original by leaving the copy in the case.

93 Attorney General McAllister: I suggest you read it.
Mr. Miller: You have no objection to withdrawing the
original?

General McAllister: No.

Said documents so offered in evidence by plaintiff and which have
been duly marked by the reporter as Plaintiff's Exhibit 1 and Plaintiff's
Exhibit 2, respectively, were then read by counsel for plaintiff,
and are in the words and figures following, to-wit:

PLAINTIFF'S EXHIBIT 1.

Office of the State Tax Commission,

Jefferson City, Missouri.

(2305).

Prior to February 20, 1919, the Tax Commission adjudged that
in calculating the franchise tax the liabilities should not be deducted
from the assets.

That pursuant to said order the franchise tax of the St. Louis-San
Francisco Railway Company was calculated in the office of the State
Tax Commission. That said franchise tax of said St. Louis-San
Francisco Railway Company was under consideration by the Tax
Commission until on or about September 12, 1919, when it was certi-
fied to the State Auditor.

From the first written report duly filed by said corporation with
the Commission on January 31, 1919, the Commission finds that said
corporation is organized under the laws of this State with its prin-
cipal business office at St. Louis, Missouri; that it employs a part of
its capital stock in business in this State and a part thereof in busi-
ness in other states; that its capital stock issued and outstanding is
\$57,947,026.00; that the clear market value of its outstanding capital
stock is \$8,100,742.00; that the clear market value of its property
and assets in this State is \$122,825,652.00; that the clear market
value of its property and assets without this State is \$206,232,876.00;
that the clear market value of its total outstanding capital stock, sur-
plus, property and assets is \$329,059,548.00; that the amount of its
capital stock employed within this State is \$21,625,820.00;

95 and the amount of its capital stock employed without this
State is \$36,321,196.00; that in finding the clear market
values aforesaid the Commission does not exclude the corporation's
indebtedness and liabilities, but such findings are the market values
without deduction of such indebtedness and liabilities.

Said written report of said corporation states that said corporation
has no surplus and no undivided profits, but the Commission finds
from said report, said report containing the only facts within or con-
cerning to the knowledge of the Commission from which it can determine
the amount of said Franchise Tax, that the difference between the
clear market value of said corporation's property and assets in this

date, irrespective of how or by what means acquired and without reference to said corporation's indebtedness, and said par value of said issued and outstanding capital stock employed within this State, \$101,280,822.00, and within the contemplation of said Franchise Tax Law, is surplus, and subject to the payment of an annual Franchise Tax.

The Commission therefore finds and determines that said corporation is liable to pay a Franchise Tax for the calendar year 1919 of 40 of one per cent of said par value of its outstanding capital stock employed within this State and of its surplus employed within this State, making to-wit a total of \$122,826,652.00, the Franchise Tax so computed being \$92,119.36; and directs that the Secretary of the Commission for and on behalf of the Commission report the amount of said tax so determined to the State Auditor pursuant to the provisions of said Franchise Tax Law.

(Signed)

R. N. D. WILLIAMS,
Chairman

STATE OF MISSOURI,
County of Cole, etc.

I, Olga Meals, secretary of the State Tax Commission of the State of Missouri, hereby certify that the above and foregoing is a full, true and complete copy of the records and proceedings of the State Tax Commission in the matter of the report and assessment of the corporation franchise tax assessed against the St. Louis-San Francisco Railway Company for the year 1919, under the provisions of the Corporation Franchise Tax Law, approved April 9, 1917, Laws of Missouri, this the 14 day of October, A. D. 1919.

Given under my hand and the seal of said State Tax Commission at its office in the capitol in the City of Jefferson and State of Missouri, this the 14 day of October, A. D. 1919.

(Signed)

OLGA MEALS,
Secretary of the State Tax Commission.

PLAINTIFF'S EXHIBIT 2.

\$16,219.37.

Treasurer's Office, State of Missouri.

City of Jefferson, Dec. 13, 1919.

Received of St. Louis San Francisco Railway Co.—12/25—Sixteen Thousand Two Hundred Nineteen & 36/100 Dollars, for credit of General Revenue Fund, the sum being the amount which the said St. Louis San Francisco Ry. Co. concedes is due the State of Missouri as Corporation Franchise Tax for the year ending Dec. 31, 1919, under the provisions of the Corporation Franchise Tax Law, Laws of Missouri, 1917, pages 237 to 242.

This receipt is given and accepted upon the express understanding that the State Tax Commission has determined and certified the amount of the aforesaid franchise tax to be Ninety Two Thousand

One Hundred Nineteen & 98 100 (\$92,118.98) — which the said St. Louis San Francisco Ry. Co. claims is excessive and refuses to pay in full and that neither the state nor the said St. Louis San Francisco Ry. Co. waive their respective contentions, but may insist upon the same in court or otherwise, notwithstanding the payment aforesaid.

[SEAL.]

(Signed)

G. H. MIDDLEKAMP,

Treasurer.

J. O. RUSSELL,

Chief Clerk.

(Signed in Duplicate.)

HUGH STEPHENS.

Jefferson City, 96171.

98 Mr. Miller: Plaintiff offers in evidence the affidavit of Frank H. Hamilton.

General McAllister: If the court, please, I do not know, in this proceeding whether I shall make objections to the competency and relevancy of this evidence that is being offered or not; but I do object and expect to insist that the kind of evidence now offered is not competent and covers no issue in this case. This complaint alleges as a matter of fact that this is a franchise tax and I think their bill goes upon that theory, proceeds upon that theory, and that being true, their objections that the levy of this franchise tax is double taxation, in the sense that it adds to the burdens or increases or doubles their property taxation is not competent. If it is a franchise tax, it cannot be said to double the taxation of the property tax.

Judge Stone: What is the purpose of the affidavit?

Mr. Miller: The purpose of the offer is to show that when the plaintiff was incorporated in Missouri in 1913, it paid a fee in the State of Missouri of \$125,000; that is the fee fixed by the Statute that all the taxes assessed against the plaintiff for the year 1919, on the assessments shown in the certificates of the Secretary of State to the Tax Commission, a copy of which is hereby attached and made a part hereof, were duly paid; that includes the value of all franchises of the company other than its right to be a corporation. We claim that we have paid all of these taxes, and this is an affidavit which refers to and makes a part of it the certificates from the Secretary to the Board of Equalization, showing that all of our

99 property was assessed for the year 1919 and it included all subjects of assessment, tangible or intangible, except the right

to be a corporation, and I think the affidavit is very competent to this case, and material. It further states that during the entire year 1919, plaintiff was the owner of a vast amount of real property located in the State of Missouri. We are trying to put this in as short form as possible to cover the questions that we want to argue to your honors; and I think this is evidence that there would be no question about.

Judge Stone: You may produce the evidence.

Mr. Miller: I ask that this affidavit be marked Exhibit 3, Plaintiff's Exhibit 3.

Said affidavit of Frank H. Hamilton, so offered in evidence by plaintiff and admitted by the court over the objection of defendants, having been duly marked by the reporter as Plaintiff's Exhibit 3, filed herewith, made a part of this record and is in the words and figures following, to-wit:

PLAINTIFF'S EXHIBIT 3.

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff.

v.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Affidavit of Frank H. Hamilton.

STATE OF MISSOURI,

City of St. Louis, etc.:

Frank H. Hamilton, of lawful age, being duly sworn, on his oath, states:

That he is Secretary and Treasurer of plaintiff in this cause, St. Louis-San Francisco Railway Company, and that at the time said corporation was created under the laws of the State of Missouri, to-wit, the 24th day of August, 1916, he was duly elected as such Secretary and Treasurer; that the fee or tax paid to the State of Missouri for the issuance by it to said plaintiff of a charter amounted to the sum of Two Hundred Twenty-five Thousand and Twenty-five Dollars (\$225,025.00); that Affiant knows that said fee or tax was paid and that the same was in fact paid by and through Affiant and as provided by the laws of the State of Missouri.

Affiant further states that all of the taxes assessed against plaintiff for the year 1919, on the assessment shown on the certificate of the Secretary of the State Tax Commission and of the State Board of Equalization of the State of Missouri, a copy of which is attached hereto, marked "Exhibit A" and made part of this affidavit, were duly paid as required by law.

Affiant further states that during the entire year 1919 plaintiff was the owner of a vast amount of real property located in the State of Missouri.

Further Affiant saith not.

(Signed)

FRANK H. HAMILTON.

Subscribed and sworn to before me this 26th day of April, 1920.
My commission expires October 8, 1920.

(Signed)
[Notary's Seal.]

R. L. KLEIN,
Notary Public,
City of St. Louis, Missouri.

102 STATE OF MISSOURI, *set:*

To the Secretary of the St. Louis-San Francisco Railway Company:

I, Olga Meals, Secretary of the State Tax Commission and the State Board of Equalization of the State of Missouri, do hereby certify that the entire length of the St. Louis-San Francisco Railway, including sidetracks, in the State of Missouri, is 1,688.96 miles; that the distributable value thereof, including sidetrack, per mile is 14,270.— dollars, and that the total value of the rolling stock is 13,708,800.00 dollars, and that the value of that portion of the rolling stock assessed by the State Tax Commission and equalized by the State Board of Equalization of said State for the year 1919 in the state of Missouri is 4,500,075.10 dollars; that the value of said rolling stock, as apportioned to this line in said State, is the sum of 4,500,075.10 dollars; that the value of "all other property" mentioned in Laws of 1901, Section 2, page 232, as fixed by said State Tax Commission and equalized by the said State Board of Equalization upon this line in said State of Missouri, is the sum of 4,795,961.60 dollars; and that the aggregate value of depots, water tanks and turntables on said line is the sum of \$408,728.30; I further certify that the total length of the roadbed, including sidetracks, of said railway, in the County of Barry, in said State and in each city, town, village and municipal township thereof, and the total value of the roadbed and superstructure, sidetracks, rolling stock, buildings on the right of way, and "all

other property," as assessed and apportioned to said county and each city, town, village and municipal township therein by the said State Tax Commission and equalized by the said State Board of Equalization for the year 1919, is correctly set forth in the following table:

County of _____	Value per mile of rolling stock and other property named in section 11,554, except buildings,	Value per mile of roadbed and superstructure, including side-tracks, number of miles,	Value per mile of roadbed and superstructure, including side-tracks, number of miles,	Value per mile of buildings on right of way,	Value per mile of "all other property," laws of 1901, see, 2, p. 232, and buildings on right of way,	Total value of roadbed and superstructure, side-tracks, rolling stock, "all other property," "all other property," and buildings on right of way,
Barry	38.34	\$2,664.40	\$8,524.00	\$242.00	\$2,839.60	\$547,111.80
Townships (Included in County Valuation) .....	.....	.....	.....	.....	.....	.....
Cities and Towns (Included in County Valuation) .....	.....	.....	.....	.....	.....	.....
Monett	1.42	.....	.....	.....	.....	20,263.40
Purdy .....	.25	.....	.....	.....	.....	3,567.50

In testimony whereof, I have hereunto set my hand and affixed my seal of office. Done at office, in the City of Jefferson, this Oct. 2, 1919,
 [SEAL.] (Signed) OLGA MEANS,
Secretary.

104 STATE OF MISSOURI, *et al.*:

To the Secretary of the St. Louis-San Francisco Railway Company:

I, Olga Meals, Secretary of the State Tax Commission and the State Board of Equalization of the State of Missouri, do hereby certify that the entire length of the St. Louis-San Francisco Railway, including sidetracks, in the State of Missouri, is 1,688.96 miles; that the distributable value thereof, including sidetrack, per mile is 14,270.00 dollars, and that the total value of the rolling stock is 13,708,800.00 dollars, and that the value of that portion of the rolling stock assessed by the State Tax Commission and equalized by the State Board of Equalization of said State for the year 1919 in the state of Missouri is 4,500,075.10 dollars; that the value of said rolling stock, as apportioned to this line in said State, is the sum of 4,500,075.10 dollars; that the value of "all other property" mentioned in Laws of 1901, Section 2, page 232, as fixed by said State Tax Commission and equalized by the said State Board of Equalization upon this line in said State of Missouri, is the sum of 4,795,961.60 dollars; and that the aggregate value of depots, water tanks and turntables on said line is the sum of \$408,728.30; I further certify that the total length of the roadbed, including sidetracks, of said railway, in the County of Barry, in said State and in each city, town, village and municipal township thereof, and the total value of the roadbed and superstructure, sidetracks, rolling stock, buildings on the right of way, and "all other property," as assessed and apportioned to said county and each 105 city, town, village and municipal township therein, by the said State Tax Commission and equalized by the said State Board of Equalization for the year 1919, is correctly set forth in the following table:

County of	Roadbed, including side- tracks, num- ber of miles.	Value per mile of rolling stock and other property named in section 11,554, except buildings.	Value per mile of roadbed and super- structure, sidetracks, "all other property," laws of 1901, sec. 2, p. 232, and buildings on right of way.	Value per mile of buildings on right of way.	Value per mile of "all other property," rolling stock, "all other property," and buildings on right of way.	Total value of road-
						Value per mile of rolling stock and other property named in section 11,554, including side- tracks,
Barry	38.34	\$2,664.40	\$8,524.00	\$242.00	\$2,839.60	\$5,47,111.80
Townships (Included in County Valuation) .....						.....
Cities & Towns (Included in County Valuation) .....						.....
Monett		1.42				20,263.40
Purdy .....		.25				3,567.50

In testimony whereof, I have hereunto set my hand and affixed my seal of office. Done at office, in the City of Jefferson, this Oct. 2, 1919.
(Signed)

OLGA MEALS,
Secretary.

106 Mr. Miller: I next offer in evidence the affidavit of T. A. Hamilton, as follows:

Counsel for plaintiff then read to the court the affidavit of T. A. Hamilton, which said affidavit is duly marked by the reporter as Plaintiff's Exhibit 4, is filed herewith, made a part hereof, and is in words and figures as follows, to-wit:

107

PLAINTIFF'S EXHIBIT 4.

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity. No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff.

v.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Affidavit of T. A. Hamilton.

STATE OF MISSOURI,
City of St. Louis, etc.

T. A. Hamilton, of lawful age, being duly sworn, on his oath, states:

That he is now and was during all of the year 1919 a Vice-President of plaintiff, St. Louis-San Francisco Railway Company; that of his own knowledge he states the fact to be that the property, real and personal, of the plaintiff located in the State of Missouri at this time and during all of the year 1919 was acquired in large part by plaintiff from the proceeds of its operations in interstate commerce, and that no separation has ever been made between the portions of said property acquired from plaintiff's operations in interstate commerce or in intrastate commerce in the State of Missouri, or in the investments thereof, nor as Plaintiff is informed and believes, and

108 therefore states the fact to be upon such information and belief, has any such separation ever been made or attempted to be made by any of the taxing authorities of the State of Missouri.

Further Plaintiff saith not.

(Signed)

T. A. HAMILTON.

Subscribed and sworn to before me this 25th day of April, 1920.
My commission expires October 8, 1920.

(Signed)

R. L. KLEIN,
Notary Public,
City of St. Louis, Missouri.

General McAllister: Now I object to the substance of that affidavit, because it is an attempt to support a collateral attack upon the judgment rendered by the State Tax Commission in determining and assessing the amount of this tax. That necessarily was involved in the determination of the amount of tax, and that judgment of the Tax Commission cannot be disturbed by a collateral attack and this is a collateral attack upon that decision. That was in a proceeding which taxed directly, and not in a proceeding which taxes indirectly.

Judge Stone: The ruling of the court, General McAllister, on the previous offer, as well as this offer, is based, not so much upon their competency, but upon the theory that the record can best be made complete. The affidavit will be received.

109 General McAllister: I simply make these objections to get before your honors our theory of this.

Mr. Miller: Plaintiff next offers in evidence the affidavit of A. L. Carver and asks that it be marked Plaintiff's Exhibit 5. He was Assistant Real Estate & Tax Agent of the Frisco.

Counsel for plaintiff then read to the court the affidavit of A. L. Carver, which said affidavit is duly marked by the reporter as Plaintiff's Exhibit 5, is filed herewith, made a part of this record and is in the words and figures following, to-wit:

110 PLAINTIFF'S EXHIBIT 5.

In the District Court of the United States within and for the Central Division of the Western District of Missouri.

In Equity, No. —.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff,

v.

GEORGE H. MIDDLEKAMP, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Affidavit of A. L. Carver.

STATE OF MISSOURI,

City of St. Louis, ss:

A. L. Carver, of lawful age, being duly sworn, on his oath, states: That he is Assistant Real Estate & Tax Agent of St. Louis-San Francisco Railway Company, plaintiff in the above-entitled cause; that of his own knowledge he knows the fact to be that the Secretary of the State Tax Commission and of the State Board of Equalization of the State of Missouri did during the year 1919 transmit to the Secretary of plaintiff certificates in the form attached hereto, made part hereof and marked "Exhibit A," a separate certificate being

transmitted in respect of each County in the State of Missouri, in which plaintiff owns property; that the total valuations shown on all of said certificates are the same, the only difference in said statement being the localization by counties of valuations in each said county.

Attiant further states that "Exhibit B" attached hereto and made part hereof, entitled "Last Notice," was duly received by plaintiff through the United States mails in a sealed envelope addressed to St. Louis-San Francisco Railway Company from G. H. Middlekamp, State Treasurer of the State of Missouri.

Further Attiant saith not.

(Signed)

A. L. CARBER.

Subscribed and sworn to before me this 26th day of April, 1920
My commission expires October 8, 1920.

(Signed)

R. L. KLEIN,

Notary Public.

City of St. Louis, Missouri.

112

"EXHIBIT B."

(Stamp:) Received Nov. 25, 1919. R. E. & T. A. Dept., St. Louis, Mo.

Office of State Treasurer, City of Jefferson.

Nov. 19, 1919

Last Notice.

GENTLEMEN:

You are hereby notified that there has been certified to this department, a schedule showing the Corporation Franchise Tax assessed for the year ending December 31st, 1919, and that thereupon the amount of your Corporation Franchise Tax for the year 1919 is shown to be in the sum \$92,119.98, and that the same is unpaid.

Please remit the above amount at once, either in bank draft, express or post office money order, payable to G. H. Middlekamp, State Treasurer, Jefferson City, Missouri, and thereby save the penalty and interest, as provided under the law, which will be added if the same is not paid by Nov. 25, 1919 at which time the same will be returned delinquent to the Attorney General.

Yours very truly,

G. H. MIDDLEKAMP,

State Treasurer.

Kindly return this notice with your remittance, since it is a part of our record.

12305.

St. Louis-San Francisco Ry. Co.,
Ry. Exe. Bldg.,
St. Louis, Mo.

"EXHIBIT A."

STATE OF MISSOURI, *et al.*

To the Secretary of the St. Louis-San Francisco Railway Company:

I, Olga Meals, Secretary of the State Tax Commission and the State Board of Equalization of the State of Missouri, do hereby certify that the entire length of the St. Louis-San Francisco Railway, including sidetracks, in the State of Missouri, is 1,688.06 miles; that the distributable value thereof, including sidetrack, per mile is 14,270.00 dollars, and that the total value of the rolling stock is 13,708,800.00 dollars, and that the value of that portion of the rolling stock assessed by the State Tax Commission and equalized by the State Board of Equalization of said State for the year 1919 in the State of Missouri is 4,500,075.10 dollars; that the value of said rolling stock, as apportioned to this line in said State, is the sum of 4,500,075.10 dollars; that the value of "all other property" mentioned in Laws of 1901, Section 2, page 232, as fixed by said State Tax Commission and equalized by the said State Board of Equalization upon this line in said State of Missouri, is the sum of 4,795,961.60 dollars; and that the aggregate value of depots, water tanks and turntables on said line is the sum of \$408,728.30; I further certify that the total length of the roadbed, including sidetracks, of said railway, in the County of Barry, in said State and in each city, town village and municipal township thereof, and the total value of the roadbed and superstructure, sidetracks, rolling stock, buildings on the right of way, and "all other property," as assessed and apportioned to said county and each city, town, village and municipal township therein, by the said State Tax Commission and equalized by the said State Board of Equalization for the year 1919, is correctly set forth in the following table:

County of _____	Value per mile of rolling stock and other property in County, number of miles, section 11,554, except buildings.	Value per mile of road bed and superstructure, including side-tracks, number of miles, section 11,554, except buildings.	Value per mile of buildings on right way.	Value per mile of "all other property," taxes of 1901, sec. 2, p. 202.	Total value of railroad and superstructure, side-tracks, rolling stock, "all other property," and buildings on right of way.
Party	38,34	\$2,1034.00	\$89,524.00	\$242.00	\$2,829.00
Townships (Included in County Valuation)					
Cities and Towns (Included in County Valuation)	1,42				30,263.40
Monett .....	.25				3,567.50
Purdy					
In testimony whereof, I have hereunto set my hand and affixed my seal of office. of Jefferson, this Oct. 2, 1919. (Signed) <i>OMA MEALS,</i> <i>Secretary.</i>					Done at office, in the City

115. Mr. Miller: If I may explain that, the first part of this Exhibit, General, the exhibit last offered in evidence from the Secretary of State reports shows the value of the property throughout the entire state. Then a separate one was sent to the Secretary of the Company, with the name of one county where the property is located, and the amount of the property in that particular county, so there are just as many of these that were sent as shown by this affidavit (Exhibit 5) as there were counties in the State within which the plaintiff had property. That's the purpose of this affidavit. And the last notice attached to the affidavit, marked Exhibit "B" is a notice from the State Treasurer, entitled "Last Notice" referring to the amount of this tax, and asking that it be paid.

N. G. Sevier, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

Mr. Conrad.

My name is N. G. Sevier; I live at Jefferson City, Missouri, and am Clerk of the Tax Commission of the State of Missouri, and upon request I made a tabulation of twenty-five railroads and steam railways doing business in this State, showing the name of the corporation, the report made to the State Tax Commission for the ad valorem tax, the valuation made by the State Tax Commission, or recommended to the Board of Equalization, and the value as fixed by the State Board of Equalization.

116. Mr. Conrad: I will ask the stenographer to mark said paper as Plaintiff's Exhibit 6, and offer it in evidence.

General McAllister: Defendants object to that as wholly immaterial upon the grounds heretofore assigned; it's an attempt to show the assessment of the value of the property of not only this corporation, as I understand it, but some twenty-four or five others, for the purpose of property taxation. We object to it as wholly immaterial.

Mr. Conrad: If your honors, please, one of the points which we assert in this case is that this Act is not only unconstitutional in itself in its reading, but in the application of it by the State officials is unconstitutional, and that's the purpose of this evidence.

Judge Stone: The objection is over-ruled.

Said document or tabulation identified by this witness and offered in evidence by counsel for plaintiff, having been duly marked by the reporter as Plaintiff's Exhibit 6, is filed herewith, made a part hereof, and is in words and figures as follows, *to-wit*:

Names of corporations.	Report made to State Tax Commission for ad valorem tax.	Valuation made by State Tax Commission.	Value as fixed by State Board of Equalization.
Atchison, Topeka & Santa Fe Ry. Co.	\$16,721,643	\$8,632,715	
Chicago, Great Western R. R. Co.	2,630,055	1,580,126	
Chicago, Milwaukee & St. Paul Ry. Co.	8,110,776	3,625,979	
Chicago, Rock Island & Pacific Ry. Co.	16,100,200	8,511,696	
Chicago & Alton R. R. Co.	.....	.....	4,411,212
Kansas City, St. Louis & Chicago R. R. Co.	6,212,346	.....
Chicago & Alton R. R. Co. (Linen)	.....	2,000,776	
Louisiana & Mississippi River R. R. Co.	2,013,228	.....
Chicago & Alton R. R. Co. (Linen)	.....	.....
Chicago, Burlington & Quincy R. R. Co.	12,175,794	21,462,552	
Kansas City, Clinton & Springfield Ry. Co.	2,452,450	1,311,697	
Kansas City Southern Ry. Co.	9,761,320	4,540,321	
Missouri, Kansas & Texas Ry. Co.	20,343,013	10,027,729	
Missouri Pacific R. R. Co.	55,263,122	24,767,089	24,760,080
Quincy, Omaha & Kansas City R. R. Co.	3,928,831	2,232,894	2,237,794
St. Louis & San Francisco Ry. Co.	74,751,681	24,101,460	24,101,460
St. Louis & San Francisco Ry. Co.	.....	.....

St. Louis & Southwestern Ry. Co.,	1,585,165	2,215,895
Terminal Railroad Association of St. Louis	9,39,743	6,974,712
Walsh Railway Company	12,406,884	13,783,869

Street and Electric Railway Companies.

Joplin & Pittsburg Ry. Co.,	183,000	318,732
Kansas City Railways Company	7,500,150	12,777,326
Kansas City, Clay County & St. Joseph Ry. Co.	1,844,536	1,132,903
Missouri Electric Railroad Co.	1,000,802	633,789
Springfield Traction Co.	163,032	182,101
St. Joseph Railway, Light, Heat & Power Co.	1,039,225	1,740,933
United Railways Company of St. Louis	54,627,611	24,018,324

STATE OF MISSOURI,
City of Jefferson:

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization hereby certify that the foregoing compilation of reports made to State Tax Commission for ad valorem tax, valuation made by State Tax Commission and values fixed by State Board of Equalization is a true and accurate copy of records now on file in the office of State Tax Commission and Board of Equalization.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the 28th day of April, A. D. 1920.

[SEAL.]
 (Signed)

STATE TAX COMMISSION,
 By E. M. ZEVELY,
Seal.

118 Q. Have you further documents?

A. I have; I have here a compilation or table of twenty-five corporations, including railroads, railway companies and street and electric railway companies, showing the number, the name of the corporation, the amount on which the franchise tax is computed at three-fortieths of one per cent; the net amount of the tax, showing whether foreign or domestic corporation, and the date the said report was certified to the State Auditor.

Mr. Conrad: I ask the stenographer to mark this document a Plaintiff's Exhibit 7 and offer it in evidence.

General McAllister: Defendants object to that as wholly immaterial and incompetent, because whatever might have been done about other corporations cannot affect the assessment against the plaintiff in this case.

The Court: Objection over-ruled.

Said document identified by the witness and offered in evidence by plaintiff, and admitted by the court over the objection of defendants, is duly marked by the reporter as Plaintiff's Exhibit 7, is filed herewith, made a part of this record and is in the words and figures following, to-wit:

(Here follows table marked page 119.)

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Number.	Name of corporation.	Amount of which tax is com- puted at 3/40ths of one per cent
11501	Atchison, Topeka & Santa Fe Ry. Co.	\$17,386.76
11515	Chicago, Great Western R. R. Co.	2,750.05
11514	Chicago, Milwaukee & St. Paul Ry. Co.	8,110.77
11516	Chicago, Rock Island & Pacific Ry. Co.	16,100.31
13624	Chicago & Alton R. R. Co.	100.00
13622	Kansas City, St. Louis & Chicago R. R. Co. (Chicago & Alton R. R. Co. Lessee.)	5,021.86
13623	Louisiana & Missouri River R. R. Co. (Chicago & Alton R. R. Co. Lessee.)	3,651.76
11512	Chicago, Burlington & Quincy R. R. Co.	40,940.66
12851	Kansas City, Clinton & Springfield Ry. Co.	1,531.16
11532	Kansas City Southern Ry. Co.	11,457.47
11550	Missouri, Kansas & Texas Ry. Co.	34,139.22
11546	Missouri Pacific R. R. Co.	36,643.46
11560	Quincy, Omaha & Kansas City R. R. Co.	6,000.00
12305	St. Louis & San Francisco Ry. Co.	122,826.63
11579	St. Louis & San Francisco Ry. Co.	51,364.10
11581	St. Louis & Southwestern Ry. Co.	6,131.07
11602	Terminal Railroad Association of St. Louis.	5,072.00
11605	Wabash Railway Company	18,107.85
	Street and electric railways.	
11530	Joplin & Pittsburg Ry. Co.	1,488.00
13263	Kansas City Railways Co.	21,010.33
11536	Kansas City, Clay County & St. Joseph Ry. Co.	4,402.15
13620	Missouri Electric R. R. Co.	1,000.00
11570	Springfield Traction Co.	400.00
11575	St. Joseph Railway, Light, Heat and Power Co.	8,174.33
13619	United Railways Company of St. Louis	41,296.00

EXHIBIT 7.

Amount of tax.	For, or dom.	Date certified to State auditor.
3,764	\$13,040.00	July 11th, 1919
0,055	2,062.54	July 11th, 1919
0,776	6,083.08	July 11th, 1919
0,310	12,075.00	July 11th, 1919
0,000	75.00	Feb. 17th, 1920
1,800	3,766.35	Feb. 17th, 1920
1,700	2,738.78	Feb. 17th, 1920
0,662	30,705.00	July 11th, 1919
1,104	1,148.33	Sept. 12th, 1919
7,474	8,593.10	July 11th, 1919
9,226	25,604.02	July 11th, 1919
3,408	27,482.55	July 11th, 1919
0,000	4,500.00	July 11th, 1919
3,652	92,119.98	Sept. 12th, 1919
4,100	38,523.00	July 11th, 1919
1,071	4,598.30	July 11th, 1919
2,008	3,804.00	July 11th, 1919
7,899	13,580.93	July 11th, 1919
8,000	1,116.00	July 11th, 1919
0,347	15,757.76	Dec. 2d, 1919
2,156	3,301.62	July 11th, 1919
0,000	750.00	Feb. 17, 1920
0,000	300.00	July 11th, 1919
4,350	6,130.00	July 11th, 1919
6,000	30,972.00	Feb. 17th, 1920

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STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization hereby certify that the foregoing compilation is a true and accurate copy of corporation franchise list on file in the office of State Tax Commission as certified to the State Auditor, for the year 1919.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the 28th day of April, A. D. 1920.

STATE TAX COMMISSION,

[SEAL.]

By —— ——,
Sec'y.

120 Q. Your next tabulation, Mr. Sevier.

A. I have here, the next document is a certificate of E. M. Zevely, Secretary of the State Tax Commission, certifying that the certificate attached is a true copy, certified to the State Auditor, among said corporations being the St. Louis-San Francisco Railroad Company, and a similar certification for the St. Louis-San Francisco Railway Company.

Mr. Conrad: I offer the first instrument referred to in evidence as Plaintiff's Exhibit 8.

Mr. McAllister: To which defendants object on the ground that it is wholly immaterial and incompetent, because whatever might have been done about other corporations cannot affect the assessment against the plaintiff in this case.

The Court: Objection over-ruled.

Said document so offered in evidence, and admitted by the court over the objection of the defendant, is duly marked by the reporter as Plaintiff's Exhibit 8, is filed herewith, made a part hereof, and is in the words and figures following, to-wit:

121 PLAINTIFF'S EXHIBIT 8.

STATE OF MISSOURI,
City of Jefferson, ss:

The State Tax Commission hereby certifies that the foregoing is a list of corporations subject to the provisions of the corporation Franchise Tax Law approved April 9, 1917, and the amount of said tax each of said corporations is liable for, for current year, as the same has been computed by said Commission in accordance with the requirements of said law.

Signed and sealed this eleventh day of July, A. D. 1919.

STATE TAX COMMISSION,
 By O. MEALS,
Sec'y.

(Signed)

122 Mr. Conrad: And the second document referred to, I offer in evidence and ask it be marked Plaintiff's Exhibit 9.

General McAllister: To which defendants object on the ground that it is wholly immaterial and incompetent, because whatever might have been done about other corporations, cannot affect the assessment against the plaintiff in this case.

The Court: Objection over-ruled.

Said document so offered in evidence by plaintiff, and admitted by the court over the objection of the defendants, is duly marked by the reporter as Plaintiff's Exhibit 9, is filed herewith, made a part of this record and is in words and figures as follows, to-wit:

123

PLAINTIFF'S EXHIBIT 9.

STATE OF MISSOURI.

City of Jefferson, ss:

I, E. M. Zevely, Secretary of the State Tax Commission, do hereby certify that the attached and foregoing certificate signed and sealed on the eleventh day of July, 1919, is a true and accurate copy of certificate, certifying a list of corporations subject to the provisions of the Corporation Franchise Tax Law to the State Auditor, the St. Louis and San Francisco Railroad Company being among those corporations certified on aforesaid date, now on file in the office of the State Tax Commission.

In testimony whereof, I have hereunto set my hand and attached the seal of this office, on this, the twenty-eighth day of April, A. D. 1920.

[SEAL.]

(Signed)

E. M. ZEVELY,
*Sec'y State Tax Commission &
 State Board of Equalization.*

124 Q. Now, have you others?

A. I have.

Q. State what they are, please.

A. I have certified copies of questions requested by Mr. Conrad and answers made thereto by the said twenty-five railroads and street railway companies.

Q. I don't quite get you. These documents that you now have are extracts or copies of what particular records of your office?

A. They are copies of reports of railroad companies now on file in our office.

Judge Stone: In connection with the franchise tax?

The Witness: Yes, sir; franchise tax reports.

Judge Stone: Of various railroads?

The Witness: Yes, sir, of various railroads and street railways.

Q. Doing business in the State of Missouri?

A. Yes, sir.

Judge Stone: For what year?

A. For the year 1919, based upon their standing as of December 31, 1918.

Mr. Conrad: I offer in evidence these documents. Plaintiff's Exhibits 10 to 33, both inclusive.

Mr. McAllister: Now, I desire to object to the admission of these reports, as I understand they are reports returned by the various corporations. Is that true?

Mr. Conrad: Yes, sir.

General McAllister: They are wholly incompetent in this matter and could only be offered for the purpose of impeaching, in this collateral proceeding, the finding and judgment of the State 125 Tax Commission as to the amount of franchise tax assessed against this plaintiff, and I want to suggest to the court with reference to giving publicity to the contents of these reports, they are declared by our statute to be confidential in their nature. Every body in the State Tax Commission, and the members of the Commission, the members of the State Board of Equalization, everybody is cautioned against making any of these reports public. Now in a proceeding in which these are material they are, of course, admissible; but if they are not really admissible in this case, I think they ought not to be admitted and given publicity; and I suggest to the court that there is a very good reason for that. The Federal Government, as a basis for that, makes it a rule of states to keep them secret, because they disclose more than if they would be given publicity. And I think the State has a right to exact from taxpayers information in reports that are not to be made public, except where the compelling necessity of court proceedings requires it.

Judge Stone: The objection of General McAllister has developed a situation which is a little bit embarrassing in this; the court, before the hearing of the argument upon the law questions involved here, can speedily determine the materiality of this testimony. Of course, it has gone upon the theory that we would admit such testimony as counsel on either side offers in support of their respective theories, upon the issues involved, and that we would later take up in the argument, and of course consider such as bore upon our view of the law; but this particular evidence, because of its character, and properly so, brings another element into the consideration, and we think that our view of maintaining the secrecy of these reports, if it can be done consistent with a complete making up of the record, and of our determination of the case; and, at the same time, having them for our consideration, if they are deemed material after we have heard the arguments upon the points involved, why the offer will stand and the court will make no ruling upon the admission or non-admission of them, until it can have the light of the argument. Now if these exhibits (referring to Exhibits 10 to 33, inclusive) are held by the court as utterly immaterial, having no bearing upon the issues in this case, and not needed to make up the record, if either party desire to appeal, why they will be excluded and their secrecy maintained. In the meantime, until such ruling, of course, they will not be made public.

Said documents, having been duly marked by the reporter as Plaintiff's Exhibits 10 to 33, both inclusive, are filed herewith, made a part of this record and are in words and figures as follows, to wit:

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PLAINTIFF'S EXHIBIT 10.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February 1919.

*Annual Report of Missouri Pacific Railroad Co., a Corporation Duly
(To avoid error typewrite or print name here.)*

*Organized and Existing Under the Laws of the State of ——
Made in Accordance with the Provisions of an Act Providing for
a Franchise Tax on Domestic and Foreign Corporations Having
Business in This State, Approved April 9, 1917, Laws of Mo
1917, Page 237.*

1. Name of Corporation, Missouri Pacific Railroad Co.
2. Location of principal business office, St. Louis Mo.
3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director
1. Authorized capital stock	\$300,000,000
5. Capital stock subscribed	\$154,639,600
6. Capital stock issued and outstanding	\$154,639,600
7. Capital stock paid up	\$154,639,600
8. Par value of stock	\$154,639,600
9. Surplus and undivided profits	\$8,570,928.51
10. Clear market value of stock	Not known
11. Nature and kind of business	Railroad

12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	\$36,643,408
14. Clear market value of property and assets without this State (other side for instructions)	\$126,567,130
15. Clear market value of total capital stock, surplus, property and assets.....	\$163,210,538
16. Par value of outstanding capital stock and surplus	163,210,538
17. Amount of capital stock employed within the State.....	\$34,747,518
18. Total amount of capital stock employed without this State.....	\$119,892,082
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report.....	

STATE OF ———,
County of ———, Mo.

———, being duly sworn, upon his oath states that he is —— of the above named ——, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of ——, 19—

Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

57 Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital em-

ployed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,

City of Jefferson, etc.

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of Missouri Pacific Railroad Co. now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

(Signed)

E. M. ZEVELY,
Sec'y State Tax Commission &
State Board of Equalization.

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PLAINTIFF'S EXHIBIT 11.

(Copy.)

Form No. 10.

Corporations, Private; Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

*Annual Report of Missouri Electric Railroad Co., a Corporation Duly
(To avoid error typewrite or print name here.)*

*Organized and Existing Under the Laws of the State of Missouri.
Made in Accordance with the Provisions of an Act Providing for a
Franchise Tax on Domestic and Foreign Corporations Having
Business in This State, Approved April 9, 1917, Laws of Mo.
1917, Page 237.*

1. Name of Corporation, Missouri Electric Railroad Co.
2. Location of principal business office, 3869 Park Ave., St. Louis, Mo.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			
4. Authorized capital stock			\$1,000,000
5. Capital stock subscribed			\$1,000,000
6. Capital stock issued and outstanding			None
7. Capital stock paid up			
8. Par value of stock			\$100.00
9. Surplus and undivided profits			None
10. Clear market value of stock			Not on market
11. Nature and kind of business			Street railroad
12. Location of place or places of business			
13. Clear market value of property and assets in this State			\$1,003,982
14. Clear market value of property and assets without this State (other side for instructions)			None
15. Clear market value of total capital stock, surplus, property and assets			See 13
16. Par value of outstanding capital stock and surplus			\$100
17. Amount of capital stock employed within the State			All
18. Total amount of capital stock employed without this State			None
19. Date of annual election of officers			
20. Change or changes, if any, in the above particulars made since the last annual report			

STATE OF ——,
County of ——, *ss.*

—, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, the — day of —, 19—.

Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

130

Instructions.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss.

I, E. M. Zevely, Secretary of the State Tax Commission and ex-officio Secretary of the State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of the Missouri Electric Railroad Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, A. D. 1920.

[SEAL] (Signed) E. M. ZEVELY.
See'st State Tax Commission &
State Board of Equalization

PLAINTIFF'S EXHIBIT 12.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Chicago Great Western Railroad, a Corporation
(To avoid error typewrite or print name here.)

Fully Organized and Existing Under the Laws of the State of Illinois. Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State. Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, Chicago Great Western Railroad Co.
2. Location of principal business office, Chicago, Illinois.
3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			
4. Authorized capital stock		998,000.000	
5. Capital stock subscribed		889,137.115	
6. Capital stock issued and outstanding		889,137.115	
7. Capital stock paid up		889,137.115	
8. Par value of stock		\$100.00	
9. Surplus and undivided profits		\$6,891,725.72	
10. Clear market value of stock			
11. Nature and kind of business		Railroad	
12. Location of place or places of business			

13. Clear market value of property and assets in this State.....	\$2,750,055.00
14. Clear market value of property and assets without this State (other side for instructions)	\$132,130,326.90
.....
.....
15. Clear market value of total capital stock, surplus, property and assets.....	\$134,880,381.00
16. Par value of outstanding capital stock and surplus	\$96,028,840.72
17. Amount of capital stock employed within the State.....	\$1,816,614.40
18. Total amount of capital stock employed without this State.....	\$87,320,500.60
19. Date of annual election of officers.....	.....
20. Change or changes, if any, in the above particulars made since the last annual report.....	.....

STATE of ——,
County of ——, ss.

—, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

_____,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, etc.

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of Chicago Great Western Railroad Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office on this the twenty-eighth day of April, A. D. 1920.

(Signed)

E. M. ZEVELY,
*Sec'y State Tax Commission &
State Board of Equalization.*

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PLAINTIFF'S EXHIBIT 13.

(Copy)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Chicago, Milwaukee & St. Paul Railway Co., a
(To avoid error typewrite or print name here.)

Corporation duly Organized and Existing Under the Laws of the
State of _____, Made in Accordance with the Provisions of an Act
Providing for a Franchise Tax on Domestic and Foreign Corpora-
tions Having Business in This State, Approved April 9, 1917, Laws
of Mo., 1917, Page 237.

1. Name of Corporation, Chicago, Milwaukee & St. Paul Ry. Co.,
2. Location of principal business office, 80 E. Jackson Blvd., Chicago, Ill.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director

134

1. Authorized capital stock	\$350,000,000
2. Capital stock subscribed	\$233,343,200
3. Capital stock issued and outstanding	\$233,343,200
4. Capital stock paid up	\$233,343,200
5. Par value of stock	\$233,343,200
6. Surplus and undivided profits	\$18,008,076
7. Clear market value of stock	\$127,364
8. Nature and kind of business	Transportation
9. Location of place or places of business	
10. Clear market value of property and assets in this State	\$8,110,776
11. Clear market value of property and assets without this State (other side for instructions)	\$583,975,971
12. Clear market value of total capital stock, surplus, property and assets	\$592,086,747
13. Par value of outstanding capital stock and surplus	\$251,351,276
14. Amount of capital stock employed within the State	\$3,196,802
15. Total amount of capital stock employed without this State	\$230,146,398
16. Date of annual election of officers	
17. Change or changes, if any, in the above particulars made since the last annual report	

STATE OF ——,
County of ——, ss:

— ——, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

— ——,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

135

Instructions.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

L. E. M. Zevely, Secretary of State, Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of Chicago, Milwaukee & St. Paul Railway Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.] (Signed) E. M. ZEVELY,
Sec'y State Tax Commission &
State Board of Equalization.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Chicago, Rock Island & Pacific Railway Co.
(To avoid error typewrite or print name here.)

a Corporation Duly Organized and Existing Under the Laws of the State of ——, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Law of Mo., 1917, Page 237.

1. Name of Corporation, Chicago, Rock Island & Pacific Railway Co.
2. Location of principal business office, 139 West Van Buren Street (La Salle Street Sta., Chicago, Ill.)
3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director

4. Authorized capital stock	.....	\$140,000,000
5. Capital stock subscribed	.....	\$129,407,160
6. Capital stock issued and outstanding	.....	\$129,407,160
7. Capital stock paid up	.....	\$129,407,160
8. Par value of stock	.....	\$100.00
9. Surplus and undivided profits	.....	\$9,668,410
10. Clear market value of stock	.....	\$54,281,000
11. Nature and kind of business	.....	Common Carrier

12. Location of place or places of business, 139 West Van Buren Street, Chicago, Ill.	
13. Clear market value of property and assets in this State.	\$16,100,310
14. Clear market value of property and assets without this State (other side for instructions)	\$331,843,798
15. Clear market value of total capital stock, surplus, property and assets.	\$347,944,108
16. Par value of outstanding capital stock and surplus.	\$139,075,570
17. Amount of capital stock employed within the State.	\$5,978,610
18. Total amount of capital stock employed without this State.	\$123,428,550
19. Date of annual election of officers.	
20. Change or changes, if any, in the above particulars made since the last annual report.	

STATE OF ——,
County of ——, ss:

— — —, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

— — —,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital em-

ployed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to question- requested by Mr. Conrad of Chicago, Rock Island & Pacific Ry. Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.] (Signed) E. M. ZEVELY,
*Sec'y State Tax Commission &
State Board of Equalization.*

PLAINTIFF'S EXHIBIT 15.

(Copy.)

Form No. 16.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

*Annual Report of The Chicago and Alton Railroad Co., a Corporation
(To avoid error typewrite or print name here.)*

*Duly Organized and Existing Under the Laws of the State
of Illinois, Made in Accordance with the Provisions of an Act
Providing for a Franchise Tax on Domestic and Foreign Corpora-
tions Having Business in This State, Approved April 9, 1917.
Laws of Mo., 1917, Page 237.*

1. Name of Corporation, The Chicago and Alton Railroad Co.
2. Location of principal business office, Transportation Building Chicago, Ill.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			

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1. Authorized capital stock	\$40,000,000
5. Capital stock subscribed	\$39,724,300
6. Capital stock issued and outstanding	\$39,724,300
7. Capital stock paid up	\$39,724,300
8. Par value of stock	\$100.00
9. Surplus and undivided profits	None
10. Clear market value of stock	\$3,972,430.00
11. Nature and kind of business	Railroad
12. Location of place or places of business	
13. Clear market value of property and assets in this State	\$100,000.00
14. Clear market value of property and assets without this State (other side for instructions)	\$117,268,013.90
15. Clear market value of total capital stock, surplus, property and assets	\$124,364,791.00
16. Par value of outstanding capital stock and surplus	\$39,724,300.00
17. Amount of capital stock employed within the State	\$33,865.00
18. Total amount of capital stock employed without this State	\$39,690,435
19. Date of annual election of officers	
20. Change or changes, if any, in the above particulars made since the last annual report	

STATE OF ———,
County of ———, ss:

———, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—

_____,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

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Instructions.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of State Tax Commission and ex officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of The Chicago & Alton Railroad Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

(Signed) E. M. ZEVELY,
Sec'y State Tax Commission &
State Board of Equalization.

PLAINTIFF'S EXHIBIT 16.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Kansas City, Clinton & Springfield Railway Co.,
(To avoid error typewrite or print name here.)

a Corporation Duly Organized and Existing Under the Laws of the State of Missouri & Kansas, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State. Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, Kansas City, Clinton & Springfield Railway Co., Springfield, Mo.
2. Location of principal business office.
3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director

1. Authorized capital stock.....	\$2,500,000
2. Capital stock subscribed.....	\$1,775,400
3. Capital stock issued and outstanding.....	\$1,775,400
4. Capital stock paid up.....	\$1,775,400
5. Par value of stock.....	\$1,775,400
6. Surplus and undivided profits.....	None
7. Clear market value of stock.....	None
8. Nature and kind of business.....	.....

12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	\$1,222,450
14. Clear market value of property and assets without this State (other side for instructions)	\$194,955
.....	
15. Clear market value of total capital stock, surplus, property and assets.....	\$1,417,405
16. Par value of outstanding capital stock and surplus	\$1,775,400
17. Amount of capital stock employed within the State.....	\$1,648,636
18. Total amount of capital stock employed without this State.....	\$126,764
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report.....	

STATE of ——,
County of ——, *mo.*

—, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—

Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mer investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, etc.

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of Kansas City, Clinton & Springfield Ry. Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office on this the twenty-eighth day of April, A. D.

1919. [Seal.] (Signed) E. M. ZEVELY,
*Sec'y State Tax Commission &
State Board of Equalization.*

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PLAINTIFF'S EXHIBIT 17.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Louisiana & Missouri River Railroad Co., a Corporation
(To avoid error typewrite or print name here.)

Duly Organized and Existing Under the Laws of the State of _____, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, Louisiana & Missouri River Railroad Co.
2. Location of principal business office, D-13 Railway Exe. Bldg., St. Louis, Mo.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			

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4. Authorized capital stock.....	\$3,651,700
5. Capital stock subscribed.....	\$3,651,700
6. Capital stock issued and outstanding.....	\$3,651,700
7. Capital stock paid up.....	\$3,651,700
8. Par value of stock.....	\$100.00
9. Surplus and undivided profits.....	None
10. Clear market value of stock.....	None
11. Nature and kind of business.....	Railroad
12. Location of place or places of business.....	None
13. Clear market value of property and assets in this State.....	\$1,518,993
14. Clear market value of property and assets without this State (other side for instruction)	None
15. Clear market value of total capital stock, surplus, property and assets.....	8
16. Par value of outstanding capital stock and surplus.....	8
17. Amount of capital stock employed within the State.....	8
18. Total amount of capital stock employed without this State.....	8
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report.....	

STATE OF ——,
County of ——, ss:

—, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

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Instructions.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Merchandise, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I. E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of Louisiana & Missouri River Railroad Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office on this the twenty-eighth day of April, A. D. 1920.

[Seal.]

(Signed)

E. M. ZEVELY.

*Sec'y State Tax Commission &
State Board of Equalization.*

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Kansas City, St. Louis & Chicago Railroad Co.
(To avoid error typewrite or print name here.)

a Corporation Duly Organized and Existing Under the Laws of the State of —, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, Kansas City, St. Louis & Chicago Railroad Co.
2. Location of principal business office, Room d-13 Railway Exchange Bldg., St. Louis, Mo.
3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director
Director

1. Authorized capital stock	.....	\$5,021,800
5. Capital stock subscribed	.....	\$5,021,800
6. Capital stock issued and outstanding	.....	\$5,021,800
7. Capital stock paid up	.....	\$5,021,800
8. Par value of stock	.....	\$100.00
9. Surplus and undivided profits	.....	None
10. Clear market value of stock	.....	None
11. Nature and kind of business	.....	Railroad
.....

12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	\$3,181,973
14. Clear market value of property and assets without this State (other side for instructions)	None
.....
15. Clear market value of total capital stock, surplus, property and assets.....	\$
16. Par value of outstanding capital stock and surplus	\$
17. Amount of capital stock employed within the State.....	\$
18. Total amount of capital stock employed without this State.....	\$
19. Date of annual election of officers.....	.....
20. Change or changes, if any, in the above particulars made since the last annual report.....	.....

STATE OF ——,

County of ——, ss:

— — —, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

_____,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of Kansas City, St. Louis & Chicago Railroad Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office on this the twenty-eighth day of April, A. D. 1920.

[SEAL] (Signed) E. M. ZEVELY,
*Serv'g State Tax Commission &
State Board of Equalization*

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of The Kansas City Southern Railway Co., a Corporation Duly Organized and Existing Under the Laws of the State of ——, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, The Kansas City Southern Railway Co.,
2. Location of principal business office, 11th & Wyandotte Streets, Kansas City, Mo.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			

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4. Authorized capital stock.....	\$51,000,000
5. Capital stock subscribed.....	\$51,000,000
6. Capital stock issued and outstanding.....	\$51,000,000
7. Capital stock paid up.....	\$51,000,000
8. Par value of stock.....	\$51,000,000
9. Surplus and undivided profits.....	\$1,533,124
10. Clear market value of stock.....	\$16,391,400
11. Nature and kind of business.....	Steam railroad
.....
12. Location of place or places of business.....	.....
13. Clear market value of property and assets in this State.....	\$9,581,320
14. Clear market value of property and assets without this State (other side for instructions).....	\$34,312,728
.....
15. Clear market value of total capital stock, surplus, property and assets.....	\$34,924,048
16. Par value of outstanding capital stock and surplus.....	\$52,533,124
17. Amount of capital stock employed within the State.....	\$11,124,630
18. Total amount of capital stock employed without this State.....	\$39,875,370
19. Date of annual election of officers.....	.....
20. Change or changes, if any, in the above particulars made since the last annual report.....	.....

STATE OF ——,
County of ——, ss:

— — —, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of ——, 19 —.

_____,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

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Instructions.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of the Kansas City Southern Ry. Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

(Signed)

E. M. ZEVELY,
*Sec'y State Tax Commission &
 State Board of Equalization.*

PLAINTIFF'S EXHIBIT 20.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

*Annual Report of The Kansas City Railways Co., a Corporation Duly
(To avoid error typewrite or print name here.)*

*Organized and Existing Under the Laws of the State of ——.
Made in Accordance with the Provisions of an Act Providing for
a Franchise Tax on Domestic and Foreign Corporations Having
Business in this State, Approved April 9, 1917, Laws of Mo., 1917,
Page 237.*

1. Name of Corporation, The Kansas City Railways Co., Kansas City, Mo.

2. Location of principal business office.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			

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1. Authorized capital stock.	\$30,000 000
5. Capital stock subscribed.	\$100 000
6. Capital stock issued and outstanding.	\$100 000
7. Capital stock paid up.	.....	\$100,000
8. Par value of stock.	.....	\$100,000
9. Surplus and undivided profits.	.....	None
10. Clear market value of stock.	.....	\$
11. Nature and kind of business.	.....	Street Railway

12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	None
14. Clear market value of property and assets without this State (other side for instructions)	None
.....
15. Clear market value of total capital stock, surplus, property and assets.....	\$
16. Par value of outstanding capital stock and surplus	\$100,000
17. Amount of capital stock employed within the State.....	\$84,000
18. Total amount of capital stock employed without this State.....	\$16,000
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report.....	

STATE OF ———,
County of ———, ss:

—— ——, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

—— ——,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

156 STATE OF MISSOURI,
City of Jefferson, ss:

L. E. M. Zevely, Secretary of the State Tax Commission and ex-officio Secretary of the State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of The Kansas City Railways Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.] (Signed) E. M. ZEVELY.

*Sec'y State Tax Commission &
 State Board of Equalization.*

PLAINTIFF'S EXHIBIT 21.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Chicago, Burlington & Quincy Railroad Co., a
 (To avoid error typewrite or print name here.)

Corporation Duly Organized and Existing Under the Laws of the State of ——, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State. Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, Chicago, Burlington & Quincy Railroad Co.

2. Location of principal business office, 517 West Jackson Blvd., Chicago, Ill.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director

4. Authorized capital stock	.....	\$110,839,100
5. Capital stock subscribed	.....	\$110,839,170
6. Capital stock issued and outstanding	.....	\$110,839,100
7. Capital stock paid up	.....	\$110,839,100
8. Par value of stock	.....	\$110,839,100
9. Surplus and undivided profits	.....	8213,663,103
10. Clear market value of stock	.....	\$182,884,515
11. Nature and kind of business	.....	.....

12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	\$40,940,662.48
14. Clear market value of property and assets without this State (other side for instructions)	\$285,529,899.52
.....	
15. Clear market value of total capital stock, surplus, property and assets.....	\$326,480,562
16. Par value of outstanding capital stock and surplus	\$324,502,203
17. Amount of capital stock employed within the State.....	\$22,933,718.18
18. Total amount of capital stock employed without this State.....	\$159,950,796.82
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report.....	
.....	

STATE OF ——,
County of ——, ss:

— — —, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

— — —,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used.

in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I. E. M. Zevely, Secretary of the State Tax Commission and ex-officio Secretary of the State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of the Chicago, Burlington & Quincy Railroad Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

E. M. ZEVELY,
*See'y State Tax Commission &
State Board of Equalization.*

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PLAINTIFF'S EXHIBIT 22.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

*Annual Report of Joplin & Pittsburg Railway Co., a Corporation
(To avoid error typewrite or print name here.)*

Duly Organized and Existing Under the Laws of the State of —, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, Joplin & Pittsburg Railway Co., Kansas City, Missouri.....	.....
2. Location of principal business office.....	.....
.....

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			
161			
4. Authorized capital stock			\$7,000,000
5. Capital stock subscribed			\$8
6. Capital stock issued and outstanding			\$8
7. Capital stock paid up			\$8
8. Par value of stock			\$100.00
9. Surplus and undivided profits			\$325,263.25
10. Clear market value of stock			\$8
11. Nature and kind of business			Electric Railway
12. Location of place or places of business			
13. Clear market value of property and assets in this State			\$325,263.25
14. Clear market value of property and assets without this State (other side for instructions)			\$1,262,880.00
15. Clear market value of total capital stock, surplus, property and assets			\$1,798,161.45
16. Par value of outstanding capital stock and surplus			\$110
17. Amount of capital stock employed within the State			\$975,000
18. Total amount of capital stock employed without this State			\$2,313,000
19. Date of annual election of officers			
20. Change or changes, if any, in the above particulars made since the last annual report			

STATE OF Missouri,
County of —, *ss.*

—, being duly sworn, upon his oath states that he is —
 of the above named —, and that the statements made in the report
 are true.

Subscribed and sworn to before me, this the — day of —, 19—.

Notary Public.

NOTE — Make and mail all remittances to the State Treasurer.

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Instructions.

A corporation organized under the laws of Missouri should
 describe and value separately each class of assets listed in answer to
 question 14.

Do not report assets held without the State that are not actively
 used in carrying on the business for which the corporation is
 organized to conduct.

Any investments, of capital or surplus, by a Missouri corporation,
 in goods purchased or in transit, foreign securities or stock of other
 corporations, outside of the State, does not represent capital em-
 ployed in another State in the sense in which that expression is used
 in the Statute. Assets of this character should be reported as
 Missouri assets.

Money and securities deposited with correspondent banks to
 facilitate exchange and save expenses is not capital employed in
 business in another State.

Outstanding accounts due from non-resident customers should not
 be reported as assets without the state. Values of this character are
 Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss.

I, E. M. Zevely, Secretary of the State Tax Commission and ex-
 officio Secretary of the State Board of Equalization, hereby certify
 that the foregoing report is a true and accurate copy of answers to
 questions requested by Mr. Conrad of the Joplin & Pittsburg Rail-
 way Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed
 the seal of this office on this the twenty-eighth day of April, A. D.
 1920.

[SEAL.]

E. M. ZEVELY,
*Sec'y State Tax Commission,
 State Board of Equalization.*

PLAINTIFF'S EXHIBIT 23.

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

*Annual Report of Wabash Railway, a Corporation Duly Organized
(To avoid error type write or print name here.)*

and Existing Under the Laws of the State of —, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Laws of Mo., 1917, Page 23.

1. Name of Corporation, Wabash Railway Company.
2. Location of principal business office, St. Louis, Missouri.
3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			

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4. Authorized capital stock.	\$143,400,000
5. Capital stock subscribed.	\$138,492,537
6. Capital stock issued and outstanding.	\$138,492,537
7. Capital stock paid up.	\$138,492,537
8. Par value of stock.	\$138,492,537
9. Surplus and undivided profits.	None
10. Clear market value of stock.	\$27,873,729
11. Nature and kind of business.	Corporation
12. Location of place or places of business.	

13. Clear market value of property and assets in this State.....	\$12,405,850
14. Clear market value of property and assets without this State (other side for instructions)	\$82,467,162
.....
.....
15. Clear market value of total capital stock, surplus, property and assets.....	\$122,746,741
16. Par value of outstanding capital stock and surplus.....	\$138,492,537
17. Amount of capital stock employed within the State.....	33,788,988
18. Total amount of capital stock employed without this State.....	\$132,703,549
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report.....	

STATE OF _____,
County of _____, on:

_____, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

_____,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

165 *Instructions.*

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of the Wabash Railway Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

E. M. ZEVELY,
*Sec'y State Tax Commission &
State Board of Equalization.*

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Terminal Railroad Association of St. Louis, a
(To avoid error typewrite or print name here.)

*Corporation Duly Organized and Existing Under the Laws of the
State of —, Made in Accordance with the Provisions of an Act
Providing for a Franchise Tax on Domestic and Foreign Cor-
porations Having Business in This State, Approved April 9, 1917,
Laws of Mo., 1917, Page 237.*

1. Name of Corporation, Terminal Railroad Association of St. Louis
2. Location of principal business office, Room 111, Union Station, St. Louis, Mo.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director

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4. Authorized capital stock.....	\$50,000,000
5. Capital stock subscribed.....	\$3,087,800
6. Capital stock issued and outstanding.....	\$3,087,800
7. Capital stock paid up.....	\$.....
8. Par value of stock.....	\$100.00
9. Surplus and undivided profits.....	\$7,331,280.32
10. Clear market value of stock.....	\$.....
11. Nature and kind of business.....	Railroad
12. Location of place or places of business.....	.....
13. Clear market value of property and assets in this State.....	\$3,569,600.39
14. Clear market value of property and assets without this State (other side for instructions)	\$3,761,679.93
.....
.....
15. Clear market value of total capital stock, surplus, property and assets.....	\$7,331,280.32
16. Par value of outstanding capital stock and surplus	\$7,331,280.32
17. Amount of capital stock employed within the State.....	\$3,569,600.39
18. Total amount of capital stock employed without this State.....	\$3,761,679.93
19. Date of annual election of officers.....	.....
20. Change or changes, if any, in the above particulars made since the last annual report.....	.....

STATE OF ———,
County of ———, ss:

—— ——, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true. ——— ——.

Subscribed and sworn to before me, this, the -- day of —, 19—.

Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I. E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of the Terminal Railroad Association of St. Louis, now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, 1920.

• [SEAL.]

E. M. ZEVELY,
*Sec'y State Tax Commission &
State Board of Equalization.*

PLAINTIFF'S EXHIBIT 25.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of St. Louis Southwestern Railway Co., a Corporation
(To avoid error typewrite or print name here.)

Duly Organized and Existing Under the Laws of the State of —, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, St. Louis Southwestern Railway Co.
2. Location of principal business office, St. Louis, Mo.
3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director

1. Authorized capital stock.....	\$130,000,000
5. Capital stock subscribed.....	\$36,249.750
6. Capital stock issued and outstanding.....	\$36,249.750
7. Capital stock paid up.....	\$36,249.750
8. Par value of stock.....	\$100.00
9. Surplus and undivided profits.....	\$10,268,245.65
10. Clear market value of stock.....	\$10,468,304.00
11. Nature and kind of business.....	State and interstate transportation of freight, passengers, mail, express and baggage.

12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	\$4,585,167.00
14. Clear market value of property and assets without this State (other side for instructions)	\$30,185,907.00
.....	
15. Clear market value of total capital stock, surplus, property and assets.....	\$34,771,074.00
16. Par value of outstanding capital stock and surplus	\$46,517,995.63
17. Amount of capital stock employed within the State.....	\$4,893,716.25
18. Total amount of capital stock employed without this State.....	\$31,356,033.75
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report.....	
.....	

STATE OF ——,
County of ——, ss:

— — —, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

— — —,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used.

in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of the St. Louis Southwestern Railway Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, 1920.

[SEAL.]

E. M. ZEVELY,
*Sec'y State Tax Commission &
State Board of Equalization.*

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PLAINTIFF'S EXHIBIT 26.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Missouri, Kansas & Texas Railway Co., a Corporation
(To avoid error typewrite or print name here.)

Duly Organized and Existing Under the Laws of the State of _____, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, Missouri, Kansas & Texas Railway Co.
2. Location of principal business office, Parsons, Kansas.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			

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4. Authorized capital stock	\$79,800,300
5. Capital stock subscribed	\$76,283,257
6. Capital stock issued and outstanding	.....	\$76,283,257
7. Capital stock paid up	.....	\$76,283,257
8. Par value of stock	.....	\$100
9. Surplus and undivided profits	.....	None
10. Clear market value of stock	.....	\$
11. Nature and kind of business	.....	Common carrier
12. Location of place or places of business	.....
13. Clear market value of property and assets in this State	.....	\$34,139,226.00
14. Clear market value of property and assets without this State (other side for instructions)	.....	\$160,605,090.56
15. Clear market value of total capital stock, surplus, property and assets	.....	\$194,744,316.56
16. Par value of outstanding capital stock and surplus	.....	\$76,283,257.00
17. Amount of capital stock employed within the State	.....	\$13,372,669.07
18. Total amount of capital stock employed without this State	.....	\$62,910,587.93
19. Date of annual election of officers	.....
20. Change or changes, if any, in the above particulars made since the last annual report	.....

STATE OF ———,
County of ———, ss:

—— ——, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this the — day of —, 19—.

—— ——,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

174

Instructions.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mer investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of the Missouri, Kansas & Texas Ry. Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

E. M. ZEVELY,
*Sec'y State Tax Commission &
 State Board of Equalization.*

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of St. Louis & San Francisco Railroad Co., a Corporation Duly Organized and Existing Under the Laws of the State of —, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917. Laws of Mo., 1917, Page 237.

1. Name of Corporation, St. Louis & San Francisco Railroad Co.
2. Location of principal business office, 2119 Railway Exchange Bldg., St. Louis, Mo.
3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director

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4. Authorized capital stock.....	\$200,000,000
5. Capital stock subscribed.....	\$51,364,100
6. Capital stock issued and outstanding.....	\$51,364,100
7. Capital stock paid up.....	\$51,364,100
8. Par value of stock.....	\$51,364,100
9. Surplus and undivided profits.....	None
10. Clear market value of stock.....	None
11. Nature and kind of business.....	None

12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	None
14. Clear market value of property and assets without this State (other side for instructions)	None
.....	
15. Clear market value of total capital stock, surplus, property and assets.....	None
16. Par value of outstanding capital stock and surplus.....	None
17. Amount of capital stock employed within the State.....	None
18. Total amount of capital stock employed without this State.....	None
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report.....	

STATE OF ——,
County of ——, ss:

—, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

_____,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mer investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used

in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, etc.:

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of the St. Louis & San Francisco Railroad Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, 1920.

[SEAL.]

E. M. ZEVELY,
State Board of Equalization,
Sec'y State Tax Commission &

(Copy.)

Form No. 10

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Manual Report of The Atchison, Topeka and Santa Fe Ry. Co., etc.
(To avoid error typewrite or print name here.)

Corporation Duly Organized and Existing Under the Laws of the State of —, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation. The Atchison, Topeka and Santa Fe Ry. Co.
2. Location of principal business office, 80 E. Jackson Blvd., Chicago, Ill.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			
179			
4. Authorized capital stock		\$374,199,500	
5. Capital stock subscribed		\$346,029,500	
6. Capital stock issued and outstanding		\$315,959,200	
7. Capital stock paid up		"	
8. Par value of stock		\$100	
9. Surplus and undivided profits		\$132,261,263.49	
10. Clear market value of stock		\$310,277,578	
11. Nature and kind of business			
12. Location of place or places of business			
13. Clear market value of property and assets in this State		\$17,286,764	
14. Clear market value of property and assets without this State (other side for instructions)		\$572,794,252	
15. Clear market value of total capital stock, surplus, property and assets		\$310,277,378	
16. Par value of outstanding capital stock and surplus		\$345,959,200	
17. Amount of capital stock employed within the State		\$10,191,958	
18. Total amount of capital stock employed without this State		\$225,767,241	
19. Date of annual election of officers			
20. Change or changes, if any, in the above particulars made since the last annual report			

STATE OF ——,
County of ——, ss:

— — —, being duly sworn, upon his oath states that he is — — — of the above named — — —, and that the statements made in the report are true. — — — — —

Subscribed and sworn to before me, this, the — day of — — —, 19 — — —

— — — — —
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of State Tax Commission and ex-officio Secretary of the State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of the Atchison, Topeka & Santa Fe Ry. Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

E. M. ZEVELY,
*Sec'y State Tax Commission &
State Board of Equalization.*

PLAINTIFF'S EXHIBIT 29.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Quincy, Omaha & Kansas City Railroad Co., a
(To avoid extra typewrite or print name here.)

Corporation Fully Organized and Existing Under the Laws of the State of ——, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, Quincy, Omaha & Kansas City Railroad Co., 547 West Jackson Blvd., Chicago, Ill.
2. Location of principal business office.
3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			

1. Authorized capital stock	\$6,000,000
2. Capital stock subscribed	\$6,000,000
3. Capital stock issued and outstanding	\$6,000,000
7. Capital stock paid up	\$6,000,000
8. Par value of stock	\$6,000,000
9. Deficit	\$220,999.08
10. Clear market value of stock	\$600,000
11. Nature and kind of business	

12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	\$600,000
14. Clear market value of property and assets without this State (other side for instructions)	None
.....	
15. Clear market value of total capital stock, surplus, property and assets.....	\$600,000
16. Par value of outstanding capital stock and surplus	\$5,779,000.92
17. Amount of capital stock employed within the State.....	\$600,000
18. Total amount of capital stock employed without this State.....	None
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report	

STATE OF ——,
County of ——, 88:

—, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this the — day of —, 19—.

—, —, —,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used

in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

L. E. M. Zevely, Secretary of the State Tax Commission and ex-officio Secretary of the State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of Quiney, Omaha & Kansas City Railroad Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

E. M. ZEVELY,
*Sec'y State Tax Commission &
State Board of Equalization.*

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PLAINTIFF'S EXHIBIT 30.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Kansas City, Clay County & St. Joseph Ry. Co.,
(To avoid error typewrite or print name here.)

*a Corporation Duly Organized and Existing Under the Laws of the
State of ——, Made in Accordance with the Provisions of an Act
Providing for a Franchise Tax on Domestic and Foreign Corpora-
tions Having Business in This State, Approved April 9, 1917,
Laws of Mo., 1917, Page 237.*

1. Name of Corporation, Kansas City, Clay County & St. Joseph Ry. Co.....

2. Location of principal business office, Kansas City, Mo., 530 Railway Exchange.....

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			

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4. Authorized capital stock.....	\$10,000,000
5. Capital stock subscribed.....	\$4,000,000
6. Capital stock issued and outstanding.....	\$4,000,000
7. Capital stock paid up.....	\$1,000,000
8. Par value of stock.....	\$100 per share
9. Surplus and undivided profits.....	\$402,156.26
10. Clear market value of stock.....	\$.....
11. Nature and kind of business.....	
12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	\$1,013,098.47
14. Clear market value of property and assets without this State (other side for instructions).....	\$27,377.62
15. Clear market value of total capital stock, surplus, property and assets.....	\$1,040,476.09
16. Par value of outstanding capital stock and surplus.....	\$4,402,156.26
17. Amount of capital stock employed within the State.....	\$4,000,000
18. Total amount of capital stock employed without this State.....	
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report.....	None

STATE OF ——,
County of ——, ss:

— — —, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true. — — —.

Subscribed and sworn to before me, this, the — day of ——, 19—.

— — —,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

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Instructions.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of the State Tax Commission and ex-officio Secretary of the State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of Kansas City, Clay County & St. Joseph Ry. Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

E. M. ZEVELY,
Sec'y State Tax Commission &
State Board of Equalization.

PLAINTIFF'S EXHIBIT 31.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of Springfield Traction Company, a Corporation
(To avoid error typewrite or print name here.)

*Duly Organized and Existing Under the Laws of the State of ——,
Made in Accordance with the Provisions of an Act Providing for
a Franchise Tax on Domestic and Foreign Corporations Having
Business in This State, Approved April 9, 1917, Laws of Mo., 1917,
Page 237.*

1. Name of Corporation, Springfield Traction Company, Landers Bldg., Springfield, Mo.

2. Location of principal business office.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director

4. Authorized capital stock.	.....	\$100,000
5. Capital stock subscribed.	.....	\$100,000
6. Capital stock issued and outstanding.	.....	\$100,000
7. Capital stock paid up.	.....	\$100,000
8. Par value of stock.	.....	\$100.00
9. Surplus and undivided profits.	.....	\$55,189.79
10. Clear market value of stock.	.....	\$86.20
11. Nature and kind of business.	.....	Electric

12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	\$344,810.21
14. Clear market value of property and assets without this State (other side for instructions)	None
.....
15. Clear market value of total capital stock, surplus, property and assets.....	\$344,810.21
16. Par value of outstanding capital stock and surplus	\$86.20
17. Amount of capital stock employed within the State.....	All
18. Total amount of capital stock employed without this State.....	None
19. Date of annual election of officers.....	
20. Change or changes, if any, in the above particulars made since the last annual report.....	

STATE OF ----,

County of ----, ss:

_____, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the --- day of ----, 19--.

_____,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mer investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used

in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,
City of Jefferson, ss:

I, E. M. Zevely, Secretary of the State Tax Commission and ex-officio Secretary of the State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of Springfield Traction Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

E. M. ZEVELY,
*Soc'y State Tax Commission &
State Board of Equalization.*

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PLAINTIFF'S EXHIBIT 32.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

*Annual Report of St. Joseph Railway, Light, Heat & Power Co., a
(To avoid error typewrite or print name here.)*

*Corporation Duly Organized and Existing Under the Laws of the
State of ——, Made in Accordance with the Provisions of an Act
Providing for a Franchise Tax on Domestic and Foreign Corpora-
tions Having Business in This State, Approved April 9, 1917.
Laws of Mo., 1917, Page 237.*

1. Name of Corporation, St. Joseph Railway, Light, Heat & Power Co.
2. Location of principal business office, St. Joseph, Mo.

3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President			
Vice-President			
Secretary			
Treasurer			
Director			

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1. Authorized capital stock.....	\$6,000,000
5. Capital stock subscribed.....	\$5,060,000
6. Capital stock issued and outstanding.....	\$5,060,000
7. Capital stock paid up.....	\$5,060,000
8. Par value of stock.....	\$5,060,000
9. Surplus and undivided profits.....	\$1,224,959.38
10. Clear market value of stock.....	\$3,036,000
11. Nature and kind of business.....	St. Ry., Lt., Pwr. & Heat
12. Location of place or places of business.....	
13. Clear market value of property and assets in this State.....	\$.....
14. Clear market value of property and assets without this State (other side for instruction)	\$.....
15. Clear market value of total capital stock, surplus, property and assets.....	\$8,174,350
16. Par value of outstanding capital stock and surplus.....	\$8,284,959
17. Amount of capital stock employed within the State.....	\$5,060,000
18. Total amount of capital stock employed without this State.....	\$.....00
19. Date of annual election of officers.....	
20. Changes or changes, if any, in the above particulars made since the last annual report.....	

STATE OF —,
County of —, ss:

— —, being duly sworn, upon his oath states that he is — of the above named —, and that the statements made in the report are true.

Subscribed and sworn to before me, this, the — day of —, 19—.

_____,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

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Instructions.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Mere investments, of capital or surplus, by a Missouri corporation, in goods purchased or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

City of Jefferson, ss:
STATE OF MISSOURI,

I E. M. Zevely, Secretary of the State Tax Commission and ex-officio Secretary of the State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to question requested by Mr. Conrad of St. Louis Railway, Light, Heat & Power Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, A. D. 1920.

[SEAL.]

E. M. ZEVELY,
*Sec'y State Tax Commission &
State Board of Equalization.*

PLAINTIFF'S EXHIBIT 33.

(Copy.)

Form No. 10.

Corporations, Private: Franchise Tax.

Report required to be made annually to the State Tax Commission of Missouri at Jefferson City on or before the first day of February, 1919.

Annual Report of St. Louis-San Francisco Railway Company, a Corporation Duly Organized and Existing Under the Laws of the State of ——, Made in Accordance with the Provisions of an Act Providing for a Franchise Tax on Domestic and Foreign Corporations Having Business in This State, Approved April 9, 1917, Laws of Mo., 1917, Page 237.

1. Name of Corporation, St. Louis-San Francisco Railway Co.
2. Location of principal business office, 2119 Railway Exchange Bldg., St. Louis, Mo.
3. Names of officers and members of the Board of Directors, with the residence and postoffice address of each:

Officer.	Name.	Residence.	P. O. Address.
President
Vice-President
Secretary
Treasurer
Director
Director
Director
Director
Director

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4. Authorized capital stock.....	\$450,000,000
5. Capital stock subscribed.....	\$57,947,026
6. Capital stock issued and outstanding.....	\$57,947,026
7. Capital stock paid up.....	\$57,947,026
8. Par value of stock.....	None
9. Surplus and undivided profits.....	\$8,100,742
10. Clear market value of stock.....	.....
11. Nature and kind of business.....	.....
12. Location of place or places of business.....	.....

13. Clear market value of property and assets in this State.....	\$122,826,652
14. Clear market value of property and assets without this State (other side for instructions)	\$206,232,896
.....
.....
15. Clear market value of total capital stock, surplus, property and assets.....	\$329,959,548
16. Par value of outstanding capital stock and surplus	\$57,947,025
17. Amount of capital stock employed within the State.....	\$21,625,830
18. Total amount of capital stock employed without this State.....	\$35,321,196
19. Date of annual election of officers, Second Tuesday in May.	
20. Change or changes, if any, in the above particulars made since the last annual report.....	
.....

STATE OF Missouri,
City of St. Louis, Mo:

S. J. Fortune, being duly sworn, upon his oath states that he is Secretary of the above named corporation, and that the statements made in the report are true.

(Signed)

S. J. FORTUNE.

Subscribed and sworn to before me, this, the 29th day of January, 1919.

(Signed)

R. L. KLEIN,
Notary Public.

NOTE.—Make and mail all remittances to the State Treasurer.

A corporation organized under the laws of Missouri should describe and value separately each class of assets listed in answer to question 14.

Do not report assets held without the State that are not actively used in carrying on the business for which the corporation is organized to conduct.

Money invested in capital or surplus by a Missouri corporation, in stock, repossessed or in transit, foreign securities or stock of other corporations, outside of the State, does not represent capital employed in another State in the sense in which that expression is used in the Statute. Assets of this character should be reported as Missouri assets.

Money and securities deposited with correspondent banks to facilitate exchange and save expenses is not capital employed in business in another State.

Outstanding accounts due from non-resident customers should not be reported as assets without the state. Values of this character are Missouri assets and should be reported as such.

All details should be reported as of December 31, 1918.

STATE OF MISSOURI,

City of Jefferson, etc.

I, E. M. Zeevly, Secretary of State Tax Commission and ex-officio Secretary of State Board of Equalization, hereby certify that the foregoing report is a true and accurate copy of answers to questions requested by Mr. Conrad of the St. Louis-San Francisco Railway Co., now on file in office of State Tax Commission.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office on this the twenty-eighth day of April, 1920.

[Seal.]

E. M. ZEEVLY,

*Sec'y State Tax Commission &
State Board of Equalization.*

196 Mr. Conrad: You may inquire.

General McAllister: If the court please, without waiving my objection I have made to the competency of any of these, in view of the statements of counsel on the action of the State Tax Commission in assessing the corporation tax of the Missouri Pacific, I would like to ask this witness a question with reference to that particular assessment.

The Court: Very well.

Cross-examination.

Gen. McAllister:

Mr. Sevier, the franchise tax assessed against the Missouri Pacific Railroad Company for 1919 was based upon the amount of property or assets in intra-state business in the State of Missouri, was it not?

Mr. Conrad: Plaintiff objects to that on the ground that the proceedings of the Commission are the best evidence; such testimony is not consistent or relevant for that reason.

Judge Stone: Do these proceedings in themselves reveal that?

General McAllister: I don't think so if the court please. In other words, I am attempting to show that originally the tax was fixed by the Commission upon the report made by these companies. Since then an investigation has been in progress and is now in process, in an effort to determine by the Commission whether the report disclosed the actual amount of property which should have been the measure of the tax.

Judge Stone: Has the levy been made, and collected?

197 Gen. McAllister: The levy has been assessed and the tax paid; but I do not think that precludes the State from making a further investigation of its original judgment, based upon an erroneous statement of facts.

Judge Stone: It has been suggested by Judge Wade that this testimony asked for by Gen. McAllister might have a bearing upon the good faith of the Commission, if that is in issue under the bill, in making these various assessments.

Mr. Conrad: Not so much the good faith we are attacking as the method of executing this law that we are attacking here, and our position, in addition to the objection that I have made that it does not call for the best evidence, is that the matter is a finality as a matter of fact, and that the attempted proceedings here, which they seek to show, of which I know nothing, are of no legal consequence whatsoever and throw no light upon the issue.

Judge Wade: You are charging discrimination against this plaintiff. Might this not throw some light upon whether they were discriminating?

Mr. Conrad: I can see your honor's position if we charge it was done in bad faith; but our position is that in administering the law, they have adopted a rule which, in legal effect, discriminates against some corporations, of which this plaintiff is one.

Judge Stone: Although the officers are honestly endeavoring to administer the law.

198 Mr. Conrad: I will not say whether honestly or not; I merely say in the bill that we attack their mode and method and manner of executing the law and say it is discriminating, and as counsel calls my attention, while the bill does not in effect allege actual fraud, it does allege constructive fraud.

The Court: Objection sustained.

Witness excused.

Mr. Conrad: Plaintiff offers in evidence the certificate of Mr. George H. Middlekamp, State Treasurer, giving a true and complete copy of the franchise tax schedule for the year 1919, as furnished the State Treasurer's Department by the State Auditor, affecting various railroads, reference to which has heretofore been made in the testimony, and ask that the instrument be marked Plaintiff's Exhibit 34, and I offer it in evidence.

Gen. McAllister: Objected to for the reasons heretofore assigned, except this is not a matter that is required to be confidential. It is a public matter and I do not make that objection to it, but make the others.

The Court: Overruled.

Said document so offered in evidence by plaintiff, and admitted by the court over the objection of defendants, having been duly marked by the reporter as Plaintiff's Exhibit 34, is filed herewith, made a part of this record, and is in words and figures as follows, to-wit:

Plaintiff's Exhibit 34.

11301	Archison, Topeka, & Santa Fe	\$17,386,764.00	\$13,040.07
11302	Kansas City, St. Louis & Chicago	3,021,800.00	3,766.35
113022	Louisiana & Missouri R. R. Co.	3,651,700.00	2,738.78
113023	Chicago, Burlington & Quincy	40,940,662.00	30,705.50
11312	Chicago, Burlington & Quincy	2,750,055.00	2,4952.54
11313	Chicago Great Western	100,000.00	75.00
113624	Chicago & Alton	8,110,776.00	6,083.68
11314	Chicago, Milwaukee, & St. Paul	16,140,310.00	12,075.23
11316	Chicago, Rhode Island, & Pacific	1,531,104.00	1,148.33
11346	Kansas City, Clinton, & Springfield	11,457.174.00	8,593.10
12851	Kansas City, & Southern	1,000,000.00	750.00
11339	Kansas City, Electric R. R.	1,265,000.00	30,972.00
13620	United Railways of St. Louis	34,130,226.00	25,601.42
13619	M. K. & T.	38,643,408.00	27,482.55
11330	Missouri Pacific Ry.	6,000,000.00	4,500.00
11346	Quincy, Omaha & Kansas City	122,826,052.00	92,119.98
11360	St. Louis & San Francisco R. R. Co	31,364,100.00	38,223.08
12605	St. Louis & San Francisco R. R. Co.	6,131,071.00	4,208.30
11579	St. Louis South Western Ry.	5,072,008.00	3,804.00
11581	Terminal Rail and Asth.	18,107,890.00	13,580.00
11602	Walsh Rail & Co.	1,188,000.00	1,116.00
11065	Joplin & P. R. Ry.	21,010,217.00	15,201.76
11339	Kansas City Railways Co.	1,402,156.00	1,201.62
132963	Kansas City, Clay County & St. Joseph	8,174,250.00	6,120.76
11536	St. Louis & Railway L. H. & T. Co.	100,000.00	300.00
11570	Spring Hill Traction Co.		

STATE OF MISSOURI,

County of Cole, ss:

200 I, Geo. H. Middlekamp, State Treasurer, do hereby certify that the above and foregoing is a true and complete copy of the Franchise Tax Schedule for the year 1919 as furnished this department by the State Auditor as fully and complete as the same now appears on file in my office, insofar as the same applies to the above corporations:

In testimony whereof I hereunto affix my name and seal of office done in the City of Jefferson, State of Missouri, this 27th day of April, 1920.

G. H. MIDDLEKAMP,
State Treasurer.

201 The plaintiff here rested its case.

The defendant to sustain the issues upon his part, offered and introduced evidence as follows:

Roy D. WILLIAMS, having been first duly sworn testified on behalf of the defendants as follows:

Direct examination.

Gen. McAllister:

Q. Your name is Roy D. Williams?

A. Yes, sir.

Q. And where do you reside?

A. I am now living in Kansas City. My home formerly was in Boonville, Missouri.

Q. What official position do you hold with the State Government, if any, of Missouri?

A. I have been chairman of the State Tax Commission since the 27th of May, last year.

Q. May 27, 1919?

A. 1919, yes sir; I think that's the date.

Q. The State corporation franchise taxes are assessed by the State Tax Commission?

A. Under our direction, yes, sir.

Q. That is, under your direction?

A. Yes, sir.

Q. Has that Commission promulgated any rule for the determination of the amount of franchise tax, applying to one particular class of corporations as different from other corporations to which the tax is subject?

A. No sir, it never has; never.

Q. State whether or not the rule or direction of the Tax Commission as to the assessment of the tax applies to all corporations which are subject to the tax?

202 A. It does, and the rule as laid down in the Marquette case is the rule laid down in the Frisco case. Those rules are to be followed. Of course, there are 18,000 corporations—seventeen or 16,000 corporations, and the clerks are instructed to figure it out along that line.

Q. The clerks are directed to figure the amount of the tax upon all corporations alike?

A. By the same rule, yes sir; and I think I should say that probably they are guided by the return of the corporation, unless there's something that's radically wrong. It is not called to the direct attention of the commission, but is figured from the report of the corporation which is required by law.

Mr. McAllister: I believe you gentlemen may inquire.

Cross-examination.

Mr. Miller:

Q. Mr. Williams, at the time this tax was assessed against the Frisco, there was also a report made to the Commission by the Frisco, as an additional or supplemental report?

A. Yes, sir.

Q. In which an affidavit attached to it showed that the Frisco had reported on the same basis as your Commission had already assessed the tax of the Missouri Pacific; that is, on a capital stock basis. That was brought to your attention before the tax was assessed, was it not?

A. No, I don't just recall it that way, Mr. Miller.

Q. Don't you recall, Mr. Williams—

A. (Interrupting.) Now, just a moment, I will give you my recollection. You may be right about it. It is some time 203 ago but you filed an affidavit there and wanted to make a supplemental return on it; you wanted to make your return upon a capital stock basis, but your former return had been made upon the asset basis.

Q. Yes; that's true.

A. Then I misunderstood you.

Q. Yes; we had made our return the assets basis; but before the tax was assessed, your attention was called to a supplemental report that we had made upon a capital stock basis, and that capital stock basis, as we explained to your Commission, both orally, by representatives of the Frisco, and by affidavit attached, was the same form of report and the same basis as you had considered and assessed the tax on for the Missouri Pacific, and we asked then if you would not correct your return to the basis that you had applied in the Missouri Pacific case.

A. Now most of that is my recollection, except this, that the Missouri Pacific tax at that time had been assessed and had been paid upon an erroneous return. Mr. Miller called our attention to it; that's the first time it had been so called. The assessment was

made before May 27th. I think the tax was paid before May 27th. I won't be sure. If you will give me some date when you called my attention to it, I can tell you.

Q. It was about the 14th of October; we called your attention to it at several conferences, as you will recall.

A. Yes, sir; I recall.

Q. Culminating in a conference on the 14th of October?

A. Yes; the first time you called our attention to it, we started an investigation as to the return of the Missouri Pacific Railroad.

204 I had the clerks in the office go and get the general property tax return, and we determined at that time that the Missouri Pacific had made an erroneous return. However, the tax was assessed against the Frisco, or rather the same rule was applied, in view of our return, to the Frisco, as to the Missouri Pacific; but, of course, the figures being different and the erroneous return of the Missouri Pacific, the tax was different. And I took it up with Gen. McAllister and asked him to advise us as to how we could proceed to collect that additional tax from the Missouri Pacific; Gen. McAllister and I have had several conferences in regard to it, but the tax was paid on the Missouri Pacific before you ever called our attention to it.

Q. I think that's true, Mr. Williams.

A. And this year we are holding up the Missouri Pacific for an investigation, just like we are yours.

Q. But your attention was called to this fact that our report before you at the time you assessed our tax, was on a capital stock basis; the one that we asked to file and the one that was, as a matter of fact, filed, was on a capital stock basis, just like the Missouri Pacific, and you knew the Missouri Pacific's at the time you assessed ours, was on a capital stock basis, did you not?

A. Well, I knew from your affidavit.

Q. Well, you ascertained afterwards it was?

A. I wouldn't be willing to say under oath that it was on a capital stock basis, but I will say it did not correspond to their property tax, but it was erroneous. I wouldn't say about that because it 205 might have been arrived at in different ways.

Q. You made no change in our tax after your attention had been called to it?

A. No, we did not.

Q. Now let me ask you this: There are about thirteen or fourteen railroads doing business in Missouri?

A. Well, I will take your judgment on it; I didn't count them.

Q. As chairman of the State Tax Commission these reports came before you, and they show which companies are foreign companies and which are state companies, the reports that are made to you on the franchise tax and also on the property tax?

A. Yes, sir, if the report is made out correctly.

Q. Now you know, as a matter of fact, and I think we can get this in this form if there is no objection, as to how many of these railroad companies doing business in Missouri are Missouri corporations, and if it is not a fact that the only ones engaged in Missouri as

Missouri corporations are the Frisco, the Missouri Pacific and the Kansas City Terminal, the St. Louis Terminal of St. Louis and the Kansas City Southern? Those are the only Missouri corporations, are they not?

A. Well, I wouldn't be willing to say that; I take it you are right, but I have no recollection of the fact.

Q. I have no recollection of the fact myself, but I think that's right. I can get the reports.

A. Well, I wouldn't have any recollection on that.

Q. I will ask you this question, Mr. Williams, although I think the information was disclosed. In determining, under this Act, what constitutes the surplus of a railroad corporation, you in 1919, in assessing the tax for the Frisco, included all of the property and assets of the Frisco, the gross value of the property and assets 206 and assessed the tax on the gross value less the par capital stock in Missouri, without deducting any liabilities or indebtedness of any kind whatever, did you not?

A. You know the record would show that. You remember you came down and we let you make a record?

Q. Yes.

A. The Tax Commission said "You make your own record on this; just state the facts and make up your record and certify it so you can take it to court." Now I would rather you would introduce that record.

Q. I have offered it and I am satisfied all of that is in there but counsel called my attention to it; I didn't know.

A. Well, I have a certified copy of it here.

Cross-examination.

Mr. Sawyer:

Q. In the case of the Frisco, you say the Commission had a hearing?

A. Yes, sir.

Q. There was no such hearing in the case of the Kansas City Terminal Railway, was there?

A. I don't recall it if there was; I think not; we would give anybody a hearing.

Q. Presumably, but in the great majority of these corporations I believe you said you designated to the Secretary the basis of computation and then the Secretary computed the tax?

A. All of them. Don't misunderstand me, not a majority but all of them.

Q. And that course was followed in the case of the Kansas City Terminal?

207 A. So far as I know, it should have been.

Q. There was no meeting of the Commission as a body to pass upon the amount of the tax which the Terminal should pay?

A. Oh, no.

Gen. McAllister: I object to that. Certainly the record of the Tax Commission cannot be attacked in that way. I certainly think that is going a long ways in a collateral assault upon the judgment of a body that is at least quasi judicial.

Judge Stone: Sustained. We cannot tell what issues are involved, but there is certainly no such an issue in this case of the Frisco.

Mr. Sawyer: There certainly is, your honor, in our bill of the Kansas City Terminal Railway Company. The Frisco had a hearing.

Judge Stone: It is the sense of the court that all these cases should be heard at once and then we can have all these pleadings before us.

Mr. Sawyer: I think your honor is right about that. I thought at the close of the case it would be appropriate or that would be the appropriate time to ask General McAllister about it. As far as I am concerned, I am willing to submit our case on the evidence already in, and I am willing to submit our case on the evidence submitted by the Frisco, except a few questions to be asked Mr. Williams, if General McAllister is willing to do that?

Gen. McAllister: Well, the copy of the petition was handed to me just before this trial began and I have had no opportunity to look it over. Mr. Sawyer says it is in many respects similar to this, 208 but I would like an opportunity to ascertain in what respects it is not similar and what the issues are involved in it.

Judge Stone: I think then we had better reserve the ruling until we get all of it.

Mr. Sawyer: And I may recall Mr. Williams?

Judge Van Valkenburg: Speaking for myself, I will say that it is contemplated that the number of different bills are to be filed, involving this same substantial question, all of which must be passed upon by a court of three judges. It would be a matter of great embarrassment to the time and convenience of the judges of this circuit if a number of these hearings have to be held and it would be very desirable if they could all be brought within the compass of this hearing, if practicable.

Gen. McAllister: I think so, but as I said, I would like to be able to read the bill over before I would want to submit the issues in that bill here.

Mr. Sawyer: I do not want to presume upon the court or Mr. McAllister, but the questions I want to ask Mr. Williams will only take a few minutes and the testimony could be stricken out in case we do not reach an agreement that the cases should be heard together.

Mr. McAllister: That's all right, except I want to object to the competency of the evidence.

Judge Stone: As I understand, General, you have no objections to the last suggestion made by Mr. Sawyer?

Gen. McAllister: No, I have no objection, but I believe I did object—did you ask him any question?

209 Mr. Sawyer: Yes, I asked him a question, which the stenographer can read.

Reporter (reading): "There was no meeting of the Commission as a body to pass upon the amount of the tax which the Terminal should pay?"

A. Oh, no."

Gen. McAllister: I move that the answer be stricken out.

The Court: Motion over-ruled.

The Witness: Of course there are about 14,000 corporations and 14,000 reports that are made; the Commission doesn't do any of the clerical work itself, but it directs the Secretary and employees to figure the tax in a certain way, and we have a standing order or judgment of the Commission, whenever a certain number have been calculated, they are certified down by the Secretary of the Commission to the State Auditor, as the law directs and unless somebody particularly wants a hearing, or we subpoena somebody—we have had to do that several times to make an investigation—we don't take up each report separately and have a formal hearing upon them.

Judge Van Valkenburgh: There is no provision for such formal hearing.

(Mr. Sawyer, continuing cross-examination:)

Q. So the actual determination of the amount of the tax, and the certification of it to the State Auditor, is performed by the Secretary of the Commission?

A. Well, I will say this, that the actual clerical work—

Q. (Interrupting.) I will use the word "computation", the actual computation of the tax and the certification of it to the State Auditor is performed by the Secretary of the Commission?

210 A. Or some of the employees.

Q. And the Commission, as a body, gave no separate consideration to the return of the Kansas City Terminal Railway Company?

A. I don't recall that they did.

Q. What the Commission did was simply to establish a rule by which the amount that the tax was to be was made, and left the application of that rule to the Secretary, and left all the other functions of the Commission and the certification of that tax to the Secretary?

A. Unless in some particular instance.

Q. And there was no determination of the tax of the Kansas City Terminal or any other corporation, unless they specifically requested a hearing?

A. Unless we did it of our own motion.

Q. But there was no such hearing requested by the Kansas City Terminal Railway Company?

A. I don't think so; you would probably remember that better than I would.

Q. And there was no actual determination by the Commission as a body of the amount of the Kansas City Terminal Company's tax, except as you have stated?

A. No, sir; except as I have stated.

Q. That's all.

211 Redirect examination.

General McAllister:

Q. Mr. Williams, at the time you became chairman of the Commission, the consideration of the return, or determination I should say, of the amount of the tax to be assessed against this plaintiff was under consideration by the Commission, was it not?

A. Which plaintiff is that?

Q. The St. Louis-San Francisco Railway?

A. Yes, sir, I think—I won't be sure, but what they had been assessed before; and I won't be sure whether that was under consideration when we came in or not; I was under the impression—Mr. Miller can correct me if I am wrong, but hadn't that tax been figured upon your return before we came into office?

Mr. Miller: When did you come into office?

The Witness: May 27, 1919.

Mr. Miller: I cannot answer that, Mr. Williams.

Q. Well, shortly after you became chairman of the Commission the matter was taken up, whether it had previously been fixed or not?

A. Yes, sir.

Q. And objections were made to it by the St. Louis-San Francisco Railway?

A. They wanted to file an amended return.

Q. And then—

Judge Stone: The bill states that on or about September 12, 1919, said State Tax Commission at a meeting thereof, proceeded to determine the amount of the franchise tax for the year ending December 31, 1918, which it would assess against plaintiff," and then continues,

Mr. Miller: Yes, sir; and defendant says it was held 212 under consideration until October.

Judge Stone: My only purpose in reading that was to refresh your mind as to the date.

Gen. McAllister: Well, they apparently do not object in their bill to the delay in the assessment of the tax, but that it was not assessed as the law directs, by the 1st of April. The purpose of this inquiry shows that the tax was assessed in time, but at the solicitation of this plaintiff it was re-opened by the Commission and was not finally determined until October. We show that was occasioned by their own action.

The Witness: The record of the Commission shows it was February 20, 1919, the Tax Commission adjudged that in calculating the franchise tax the liabilities should not be deducted from the assets.

Recross-examination.

Mr. Miller:

Q. This Act was passed in 1917. Now the tax for 1918 was assessed on the basis of using the word "surplus" as not the total value of property assets. In other words, it was assessed, as we contend it should be assessed, if the statute is constitutional.

A. Well, I will say this; that the information I have was that they started out to assess it that way; however, after they had made the assessment in 1917, the prior Commission adopted the rule that we found in force when we came there and we just continued that same rule.

Q. Yes; but the rule itself had never been put into practical operation by the prior Commission?

213 A. Yes, I think it had. You see we didn't go into office until May 27th. Now all those that were assessed during the year 1919 prior to May 27th, had been assessed under the assessment that we have followed in the Marquette case.

Q. The point I am making is the tax for 1918 was not assessed by the same method that you used in 1919; that you inherited from the old Commission something that it had never put in operation and when you inherited it you found that already some of your taxes for 1919 had been computed according to what you had inherited from the old Commission, and therefore you followed the old rule?

A. We have, except as to this: You say the old Commission had never assessed according to the rule, but they had assessed according to the rule the tax for 1919, but not 1918. I think you are right on that—with that correction.

Q. I think you know this fact, that in 1918, the tax for 1918 the Commission, your predecessor, deducted liabilities in order to arrive at surplus?

A. Their return showed that and those returns that I have examined I would say did deduct the liabilities from the assets in computing this tax.

Q. For 1918?

A. For 1918, in the reports that were made out that way. Now I will have to qualify that in this; that in a good many of the reports that was not distinctly stated, but I think that was the intention of the Commission in administering the franchise tax of 1917. You see this law was first passed and it was amended—yes, I think you are right on that.

Q. 1919 was the first time that they took all the gross assets as surplus.

214 A. Yes, sir; that's my understanding.

Q. That's all.

Judge Wade: We would like to know if there is any claim that there was discrimination in the assessment of the Frisco as against any other corporation, except the Missouri Pacific?

Mr. Miller: I haven't had the opportunity to examine these reports (referring to Exhibits).

Judge Wade: Now was there any other corporations compared with the Frisco except the Missouri Pacific?

Mr. Miller: Our case is on the theory that we have been discriminated against with several others in the same class. I know about the Missouri Pacific; I haven't had an opportunity to examine the reports.

The Witness: I will say this, that there is one more that I will tell about. There is one difference that I would like to explain, if you care to hear it.

Mr. Miller: Go on.

The Witness: The United Railways of St. Louis, you will find a discrepancy in that, that we have just discovered. It occurred in this way. We had been after them for some time to make a report of their assets; they finally made a report of their assets, after we had subpoenaed the secretary, Mr. Stevenson of St. Louis made it in a large paper and the tax was assessed on their assets. After the Commission had adjourned, Mr. Zevely, who is the Secretary of the

Commission, called over the telephone and said Mr. Clark 215 was there and had shown him that three million dollars of the stock of the United Railways had not been issued and outstanding, and he verified that and asked me if he should make that correction, and I told him "Yes." I found upon examination that he made that correction, but in calculating, purely a clerical error, he took the wrong figures and it makes a difference there in that particular instance; that was due last week; that tax was paid and it will be in the same position as the Missouri Pacific was and we will take it up soon. The paper is very *thick*, and in figuring it out, he got to the last page where it says "Capital stock" and "Surplus" and missed the other page. Now I think the electric company in St. Louis is in the same situation and we will make an attempt to collect those. These are the only ones that I know.

Mr. Miller: What about the Chicago & Alton?

The Witness: The Chicago & Alton was in this position: We had to subpoena the officers of the C. & A. because they wouldn't put in the report their total assets. Pending that subpoena they did put in their total assets, but I didn't look at the actual return but I suppose it was calculated upon their total assets. But we issued the subpoena for them to do that very thing. That's my understanding; I haven't examined that particular one, but it should have been calculated that way.

Mr. Miller: Would you mind examining that at the recess hour?

Witness: I should be very glad to do so.

The hour of twelve o'clock noon having arrived, a recess was taken by the court until one thirty o'clock P. M.

216 At one thirty o'clock P. M., court reconvened and resumed the hearing of the above matter, there being present same as before, and the following proceedings were had:

Judge Stone: Have you any further testimony you desire to introduce, Mr. Miller? Have you, General McAllister?

Gen. McAllister: We have nothing further, if your honors, please.

Witness Williams: Mr. Miller asked me a question just before we adjourned. Do you want me to answer that question that you asked me?

Mr. Sawyer: If you will, please.

Witness Williams: In the Chicago & Alton Railroad Company's return, I find it was regular on its face and was computed the same way as all the other railroads were, from the return that they made. It was made under protest. I think when I said this morning that we had subpoenaed them, I was confused in saying it was the Chicago & Alton Railway Company. It was the Louisiana & Missouri Railway Company and the Kansas City, St. Louis & Chicago Railway Company, which I believe is leased by the Chicago & Alton. The Chicago & Alton owns and operates them and it was these other railroads that did not make their returns on the basis we required, and we had to subpoena them.

Mr. Crane: That lessor Company never has made that return, have they?

The Witness: You mean the C. & A.?

Mr. Crane: The lessor?

217 The Witness: Yes, sir; they made it.

Mr. Crane: On this present plan?

The Witness: Yes.

Mr. Crane: After you subpoenaed them?

The Witness: Yes, and made it in accordance with the rule of the Commission.

Witness excused.

Judge Stone: Are you gentlemen ready now to present the matter in argument? I think it will be necessary, on account of the time of the court, to conclude the arguments this afternoon, and the court is of the opinion, unless you have some reason to suggest to the contrary, that an hour and a half be devoted to each side.

Mr. Miller: That is satisfactory to us.

Gen. McAllister: That is satisfactory to us.

Mr. Miller argued the case on behalf of the plaintiff, followed by Mr. Sawyer, on behalf of the Kansas City Terminal Railway Company.

Gen. McAllister argued the case on behalf of defendants, assisted by Messrs. Brondum and Gose.

Mr. H. S. Conrad closed the argument for plaintiff.

At the close of the arguments, the case was taken under advisement by the court.

218 The foregoing is a full, true and complete record of all the proceedings had at the hearing of said cause, including all of the evidence, and all of the rulings of the court, exceptions

and instructions as given by the court, and all exceptions made or allowed at the trial of said cause.

Reporter.

We have examined the foregoing transcript of the evidence, and find it correct, and it may be allowed and signed by the court at any time.

W. F. EVANS,
E. T. MILLER,
H. S. CONRAD,
Counsel for Plaintiff.

We have examined the foregoing transcript of evidence and find it correct, and it may be allowed and signed by the court at any time.

FRANK W. McALLISTER,
Attorney General;

JOHN T. GUSE,
Assistant Attorney General,
Counsel for Defendants.

Approved Nov. 5/20.

ARBA S. VAN VALKENBURGH,
District Judge.

219 UNITED STATES OF AMERICA,
Western District of Missouri, etc.

I, Edwin R. Durham, Clerk of the District Court of the United States for the Central Division of the Western District of Missouri, do hereby certify that the foregoing is a full, true and correct transcript of the record and proceedings, including the pleadings, evidence and exhibits, in the cause entitled St. Louis-San Francisco Railway Company, Complainant, vs. George H. Middlekamp, Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants, No. 15 (equity) as the same remain on file and of record in my office.

Witness, my hand and seal of said Court, at Jefferson City, in said District, this 13th day of November, A. D. 1920.

[Seal of the United States District Court of Missouri, Central Division, Western District.]

EDWIN R. DURHAM,
Clerk.

By H. C. GEISBERG,
Deputy.

220 UNITED STATES OF AMERICA,
Western District of Missouri, etc.

In obedience to the order of Court allowing an appeal to the Supreme Court of the United States in the cause entitled St. Louis-San Francisco Railway Company, Complainant, vs. George H. Middlekamp, Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants No. 15 (Equity), I herewith transmit to the Supreme Court of the United States a full, true and complete transcript of the record and proceedings, including pleadings, evidence and exhibits in said cause together with all things concerning the same.

Witness, my hand and the seal of the District Court of the United States for the Central Division of the Western District of Missouri, this 13th day of November, A. D. 1920.

[Seal of the United States District Court of Missouri, Central Division, Western District.]

EDWIN R. DURHAM,
Clerk.

By H. C. GEISBERG,
Deputy.

Endorsed on cover: File No. 27,993. W. Missouri D. C. U. S.
Term No. 6305. St. Louis-San Francisco Railway Company, appellant, vs. George H. Middlekamp, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri. Filed December 4th, 1920. File No. 27,993.



1920
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.
NO. 636.

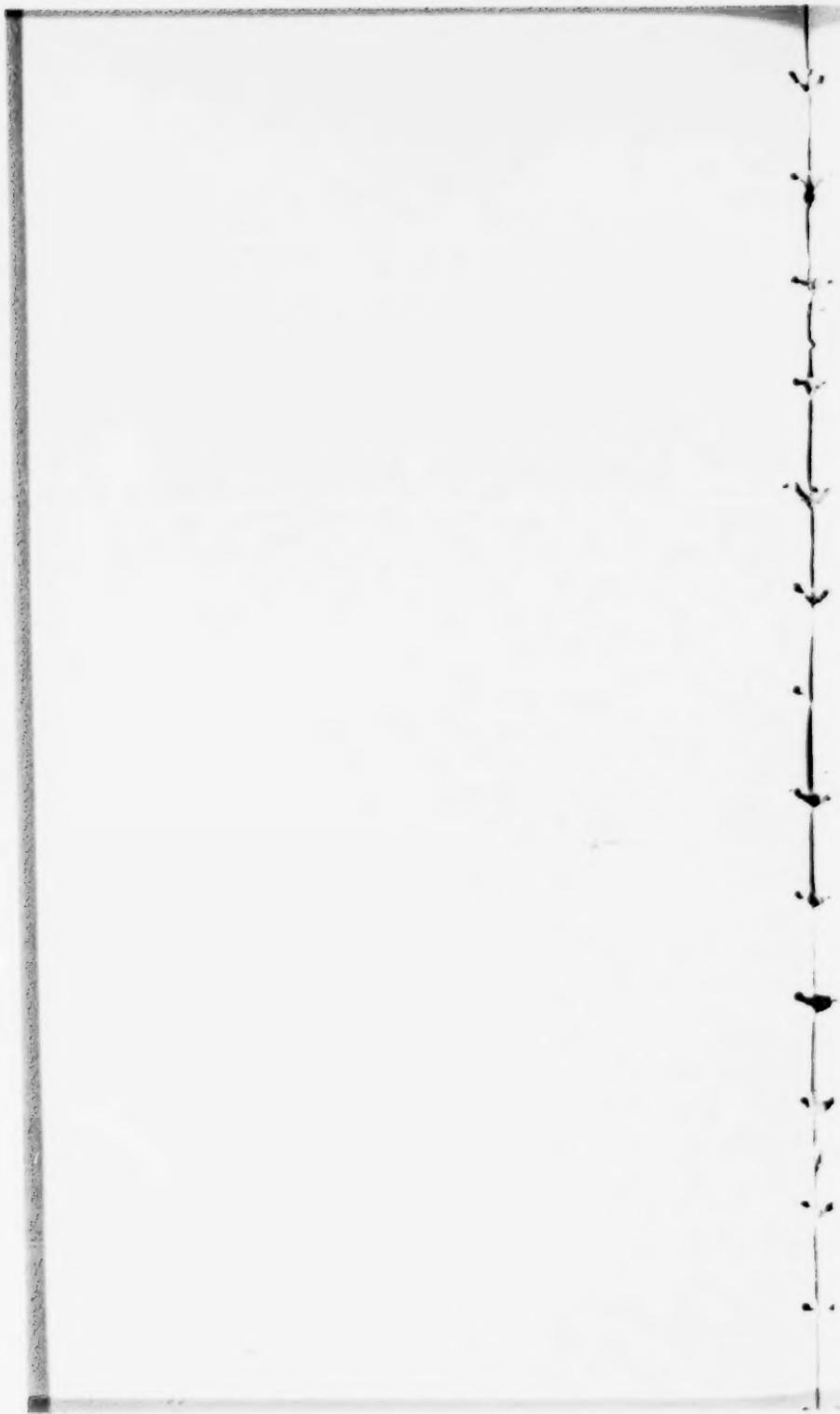
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Appellant,

vs.
GEORGE H. MIDDELKAMP, State Treasurer of the State
of Missouri, and FRANK W. McALLISTER, Attorney-
General of the State of Missouri.

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE CENTRAL DIVISION
OF THE WESTERN DISTRICT OF MISSOURI.

MOTION TO ADVANCE.

FRANK W. McALLISTER,
Attorney-General of Missouri,
JOHN T. GOSE,
Assistant Attorney-General,
Solicitors for Appellees.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

NO. 636.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Appellant,

vs.

GEORGE H. MIDDLEKAMP, State Treasurer of the State
of Missouri, and FRANK W. McALLISTER, Attorney-
General of the State of Missouri.

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE CENTRAL DIVISION
OF THE WESTERN DISTRICT OF MISSOURI.

MOTION TO ADVANCE.

The appellees, George H. Middelkamp, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney-General of the State of Missouri, move the Court to advance this cause on the docket and hear the same at its early convenience during the present term of this Court in preference to civil causes pending between private parties.

THE MATTER INVOLVED.

The appellant, St. Louis-San Francisoc Railway Company, filed its bill of complaint in the United States District Court for the Central Division of the Western District of Missouri, on the 20th day of April, 1919, alleging that the Act of the General Assembly of the State of Missouri entitled "AN ACT requiring domestic corporations and foreign corporations doing business in this state to pay an annual franchise tax, etc.," approved April 9, 1917, and contained in the Laws of Missouri, 1917, at pages 237 to 242, inclusive, imposing an annual fran-

chise tax of three-fortieths of one per cent on the capital stock and surplus of corporations engaged in business in this state, is invalid, illegal and void because in conflict with certain provisions of the Constitution of the United States and certain provisions of the Constitution of the state of Missouri, and because the same discriminates against appellant and imposes an unequal and unjust burden on appellant. An annual tax for the year 1919 having been assessed against complainant, it prayed for a permanent injunction against appellees, respectively, State Treasurer and Attorney-General of the State of Missouri, who are charged with the duty, under said act, of collecting the tax assessed together with penalties and interest, and otherwise enforcing its provisions, the latter being required to sue therefor in the name of the State, and complainant also prayed for an immediate temporary restraining order or injunction to restrain appellees from proceeding in any manner against complainant for the collection of said tax, penalty and interest. The District Court (Judges Kimbrough Stone, one of the judges of the United States Circuit Court of Appeals for the Eighth Circuit, and Martin J. Wade, Judge of the United States District Court for the Southern District of Iowa, sitting with the judge of said court) denied complainant's application for a temporary injunction, and this suit involving the construction and application of certain provisions of the Constitution of the United States and being from an order denying complainant a temporary injunction to restrain State officers from enforcing a law of the state of Missouri, it has appealed to this Court under the provisions of Section 266 of the Judicial Code (37 U. S. Stat. L. 1013.) In connection with its order granting the appeal, the District Court made an order restraining appellees from taking any proceedings against complainant or attempting to enforce the provisions of said act against it during the pendency of the appeal.

Briefly summarized, the complaint contains the following material allegations:

1. That the said Corporation Franchise Tax Act attempts to impose an annual franchise tax of three-fortieths of one per cent on that portion of the capital stock and surplus of foreign and domestic corporations which is employed in business in the state of Missouri, and requires each corporation subject to the provisions of the law to make a written report to the State Tax Commission; that the State Tax Commission is required to determine the amount of and assess the tax against each taxpayer and to certify the same to the State Auditor, who is required to prepare tax bills and deliver the same to the State Treasurer, whose duty it is to collect the tax; that if payment is not made to the State Treasurer when

the tax is due, he is required to add penalties and interest and certify the same as delinquent to the Attorney-General and it is the duty of the latter to sue to recover the same and to enforce the lien of the State therefor.

2. That on January 31, 1919, complainant filed with the State Tax Commission its duly verified report in the form prescribed by the above mentioned Corporation Franchise Tax Act, in which it stated that its authorized capital stock was \$450,000,000, and its capital stock subscribed, issued and outstanding \$57,947,026; that the clear market value of its property and assets, real and personal, in the state of Missouri was \$122,826,652, and that the clear market value of its property and assets without this State was \$206,232,896, and that the clear market value of its total capital stock, surplus, property and assets was \$329,059,548; that the total amount of its capital stock employed within this State was \$21,625,830, and that the total amount of its capital stock employed without this State was \$36,321,196; and that it had no surplus or undivided profits; that thereafter the State Tax Commission determined that complainant's outstanding capital stock and the clear market value of its property and assets employed in business in the state of Missouri, and the clear market value of its property and assets employed without the state of Missouri were as stated in its written report, but found that the amount of plaintiff's capital stock and surplus employed in business in the state of Missouri was \$122,826,652, and assessed complainant's corporation franchise tax for the year 1919 at three-fortieths of one per cent of that amount, or \$92,119.90, and certified the same to the State Auditor, who made out a tax bill therefor and delivered the same to appellee, George H. Middelkamp, State Treasurer of the state of Missouri; that the latter demanded payment of complainant when due, and upon refusal, added penalties and interest, and either had or was about to certify the same to the appellee, Frank W. McAllister, Attorney-General of the state of Missouri as delinquent, who was threatening to, and was about to, proceed against complainant by suit to recover the tax, penalties and interest and to enforce the lien of the state therefor.

3. That said Corporation Franchise Tax Act is unconstitutional because in violation of Section 1, Article XIV, of the Amendments to the Constitution of the United States, because the provisions of said act do not apply to corporations not organized for profit, nor to express companies or insurance companies, and do not apply to corporations having no capital stock, but having a large surplus.

4. That said Corporation Franchise Act is unconstitutional because in violation of Section 8, Article I, of the Con-

stitution of the United States, because the tax sought to be imposed is in fact a property tax and constitutes a direct burden upon complainant's property used and employed in commerce among the several states, and because said tax is based in part upon the earnings of complainant from its inter-state business.

5. That said Corporation Franchise Act is in violation of Section 10 of Article I of the Constitution of the United States, because said act impairs the contract made between the state of Missouri and complainant, under and by virtue of which, for a certain consideration paid to the State, complainant was granted the contractual right to engage in and transact business in the state of Missouri.

6. That said Corporation Franchise Tax Act is also in conflict with Sections 2, 3 and 4 of Article X and Section 53 of Article IV of the Constitution of Missouri.

REASONS FOR THE MOTION.

The execution of the revenue laws of the state of Missouri is enjoined (or restrained) by the order of the District Court in this suit, and the case comes within the terms of the Act of June 30, 1870, Ch. 181, 16 U. S. Stat. L. 176 (6 Fed. Stat. A n (2d Ed.) Sec. 949, page 92).

Furthermore, it is clearly the purpose and spirit of Section 266 of the Judicial Code (37 U. S. Stat. L. 1013) that cases of this character shall be given precedence over the cases of private litigants and speedily heard and determined by the Court.

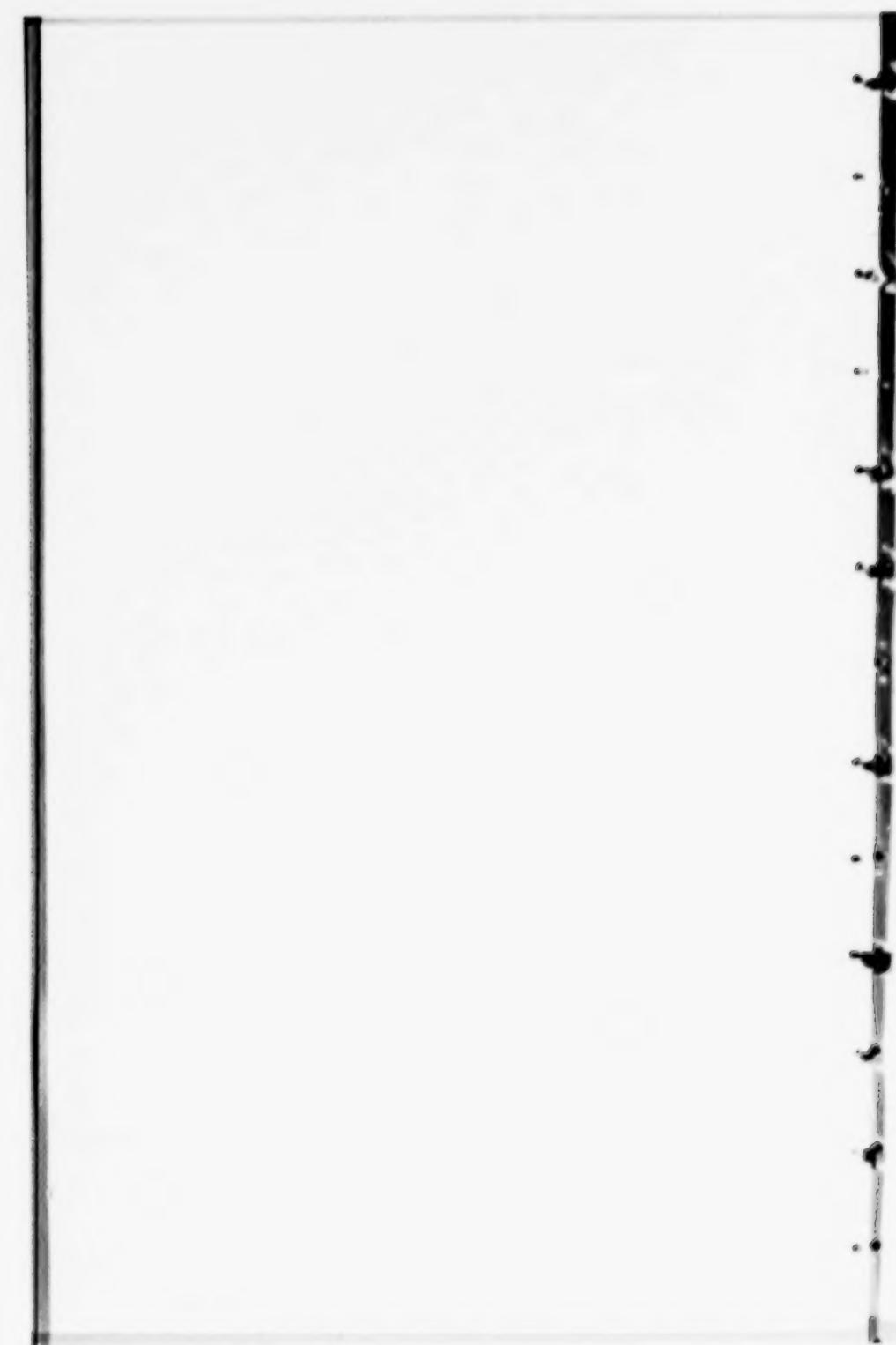
The total amount of revenue which the State ought to derive from the Corporation Franchise Tax Act, the validity of which is involved herein, is about \$2,750,000 annually, about one-fourth of the entire yearly revenue of the State. The tax is credited to the general revenue fund of the State and applied to the support of the public schools, the State educational and eleemosynary institutions, and the support of the State government generally. With the validity of the law attacked in the courts, many large corporations have refused, and still refuse, to pay the tax, some twenty suits, involving practically the same objections to the law as are involved herein, are pending in the trial courts, and the State is unable to collect large amounts of revenue to which it is entitled if the law is valid.

It naturally follows that the financial affairs of the State are unsettled, and that the State is embarrassed by reason of its failure to receive a large amount of revenue which is needed for the support of its institutions and by the uncertainty as to the amount of revenue which will be available during each calendar year.

As stated above, some twenty suits are now pending in the trial courts of the State and of the United States, involving the same objections to the validity of the State law as are involved here, and many taxpayers who have not yet filed suits are refusing to pay the taxes assessed against them and will seek injunctions in the courts if any effort is made by the State officers to enforce payment. This case is, therefore, representative of a numerous class of cases now pending and others which will probably be brought, and all of which will be determined by the decision of the Court in this case.

FRANK W. McALLISTER,
Attorney-General of Missouri,
JOHN T. GOSE,
Assistant Attorney-General,
Solicitors for Appellees.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920
No. 636.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Appellant,

vs.

GEORGE H. MIDDELKAMP, State Treasurer of the State
of Missouri, and FRANK W. McALLISTER, Attorney-
General of the State of Missouri.

TO W. F. EVANS, E. T. MILLER and H. S. CONRAD,
SOLICITORS FOR APPELLANT:

Please take notice that appellees will file the accompanying
motion to advance the above entitled cause in the Supreme
Court of the United States, and will present same to the Court
on the 20th day of December, 1920, or as soon thereafter as
counsel may be heard.

This, the 11th day of December, 1920.

FRANK W. McALLISTER,
Attorney-General of Missouri,
Solicitor for Appellees.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

ST. LOUIS-SAN FRANCISCO
RAILWAY COMPANY,

Appellant,

v.

LARENZO D. THOMPSON, State

Treasurer of the State of Missouri,

and JESSE W. BARRETT, Attorney-

General of the State of Missouri,

Appellees.

No. 636.

Appeal from the District Court of the United States, Central
Division of the Western District of Missouri.

BRIEF OF APPELLANT.

EDWARD T. MILLER,

HENRY S. CONRAD,

Solicitors for Appellant.

WILLIAM F. EVANS,
Of Counsel.



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The decree of the trial court is erroneous in the following particulars:

(a) In failing to consider and determine appellant's contention that the Missouri Franchise Tax Act of 1917 is in violation of Sections 3, 4, 5 and 21 of Article X, or one or more thereof, of the Constitution of Missouri, as constituting double taxation, and in holding and decreeing that all taxes of appellant, other than its right to be a corporation, were not assessed against appellant under the provisions of Sections 11551 and 11552, Revised Statutes 1939 of Missouri, and in holding and decreeing that the Legislature of Missouri had the right to impose a further tax on appellant, to wit, the franchise tax in controversy.

(b) In failing to hold and decree that by reason of the fact that appellant was deprived by the Government of the United States of the privilege of doing business, and of the exercise of its corporate franchise in the State of Missouri during the whole and every part of the year 1919, appellant thereby was not subject to the imposition of the tax in controversy.

INDEX - Continued.

- (c) In failing to hold and decree that the franchise tax should be measured solely by the capital stock of appellant employed in Missouri as required by section 1 of the act.
- (d) In failing to hold and decree that said Franchise Tax Act is unconstitutional and void because in violation of Section 1, Article XIV of the Federal Constitution, which provides that no person shall be deprived of property without due process of law, in that said act contains no provision for any notice, hearing or review for the taxpayer before or after assessment of the tax.
- (e) In holding and decreeing that the state taxing authorities of the State of Missouri correctly interpreted and applied the word "surplus" as used in said act, and in further holding and decreeing that said court was bound by the decision of the Supreme Court of Missouri respecting the interpretation and application of said word "surplus".
- (f) In failing to hold and decree that the state taxing authorities, in administering the Act of 1917, unlawfully and unconstitutionally discriminated against appellant by assessing its tax greatly in excess of and out of all proportion to taxes assessed against other railroad companies in Missouri, similarly circumstanced as appellant, in violation of Section 1, Article XIV of the Federal Constitution, thereby denying to appellant the equal protection of the law,

and in violation of Section 3, Article X of the Constitution of Missouri, requiring uniformity in taxation.

(g) In holding and decreeing that the franchise tax in controversy is not a direct burden upon or interference with interstate commerce, and that the State of Missouri had the lawful authority to impose said tax, and that the same is in nowise a violation of Sections 8 and 10 of Article I of the Constitution of the United States, and in further holding and decreeing that said act and the tax assessed against appellant thereunder do not involve property of appellant beyond the limits of the State of Missouri which is not subject to taxation within said state.

(h) In holding and decreeing that said act, as construed by the Supreme Court of Missouri, and as applied by the State Tax Commission, was not an interference with and unduly burdensome on interstate commerce, in violation of Sections 8 and 10 of Article I of the Constitution of the United States, and in failing to hold and decree that the measurement of the tax under said act was arbitrary, unreasonable, and unduly burdensome on interstate commerce, in violation of Sections 8 and 10 and of Section 1 of Article XIV of the Constitution of the United States.

(i) In holding and decreeing that said act is valid, and in refusing to grant a temporary injunction as prayed by appellant, and in failing

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to hold and decree that appellant did not and does not in fact owe said franchise tax in the sum of \$92,119.98, and in holding and decreeing that appellant owes of said franchise tax so assessed the sum of \$75,900.62.

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(a) Double taxation in Missouri is prohibited by the Constitution of that State. Under the provisions of Sections 11551 and 11552, Revised Statutes of Missouri, 1929, appellant paid all franchise taxes to which it could be subjected, and the attempt to impose a further tax on appellant under the Franchise Tax Act of 1917 constitutes double taxation, and the act, under which it is assessed, is unconstitutional in that it violates Sections 3, 4, 5 and 21 of Article X of the Constitution of Missouri. If the act attempts to impose a tax upon appellant's right to be a corporation, it violates Section 10, of Article I of the Federal Constitution, in that it impairs appellant's charter contract with the State.

(b) The tax imposed was on appellant's right to transact business in Missouri during the year 1919. As appellant's railroads and property were in possession of and operated by the Federal Government during that entire year, it was not doing business in Missouri, and the privilege being thus denied, the tax could not be imposed.

(e) The tax under the Act of 1917, imposed on domestic corporations transacting business in other states as well as in Missouri, is based solely on the amount of capital stock of such corporations employed in business in Missouri. The taxing authorities ignored the plain mandate of the statute in assessing the tax in controversy.

(d) The Act of 1917 is in violation of Section 1, Article XIV of the Federal Constitution, in that it fails to provide for any notice, hearing or review for the taxpayer, either before or after the assessment of the tax, or the imposition of the severe penalties therein denounced.

(e) The State taxing authorities erroneously interpreted and administered the Act of 1917 by failing to give to the word "surplus" in said act, its plain, usual and customary meaning as excess of assets over liabilities, and in erroneously interpreting and applying the word "surplus" as denoting gross assets of appellant, less only its liability to its stockholders in respect of their capital stock.

(f) The State taxing authorities in administering the Act of 1917, unlawfully and unconstitutionally discriminated against appellant by assessing its tax greatly in excess of and out of all proportion to taxes assessed against other railroad companies in Missouri, similarly circumstanced as appellant, in violation of Section 1, Article XIV of the Federal Constitution, thereby denying to appellant the equal protec-

tion of the law, and in violation of Section 3, Article X of the Missouri Constitution requiring uniformity in taxation.

(g) The said Franchise Tax Act of 1917 imposes a tax upon the basis of all of appellant's capital stock employed in the State of Missouri, whether employed in interstate or intrastate commerce or both. In construing the act in the Marquette Hotel Investment Company case (221 S. W. 721), the Supreme Court of Missouri, in construing the word "surplus", found in said act, denied the right of the corporate taxpayer to deduct its indebtedness incident to the business by it conducted, and held that franchise taxes, to be fair, should be measured by the volume of business"; and, in accordance with that construction, the tax was assessed of which appellant complains. Further, in determining that tax, the Tax Commission followed the rule that that portion of appellant's capital stock was used in Missouri, that its property and assets in the State bears to all its property and assets, wherever located. This, regardless of the fact, as disclosed by the record, that appellant is largely engaged in interstate commerce, and that its property used for said purpose is to a great degree and to a disproportionate extent, situated in the State of Missouri, and that thereby appellant was taxed greatly in excess of and out of all proportion to what is just and equitable, and the rule so prescribed by said act is arbitrary, unreasonable and unduly burdensome to interstate commerce.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

ST. LOUIS-SAN FRANCISCO
RAILWAY COMPANY,

Appellant,

v.

LARENZO D. THOMPSON, State

No. 636.

Treasurer of the State of Missouri,
and JESSE W. BARRETT, Attorney-
General of the State of Missouri,

Appellees.

Appeal from the District Court of the United States, Central
Division of the Western District of Missouri.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

Appellees are the successors in office to the original defendants, and it has been agreed that all pleadings, orders and injunctions heretofore issued in this cause against the original defendant may stand as

against the present appellees, and their appearance has been duly entered herein. The cause was heard in the District Court on application for a temporary injunction before three judges. The injunction was denied, hence this appeal.

In order that the Court may be fully advised of the matters in controversy a brief statement may not be inappropriate. In 1917 the legislature of Missouri enacted a franchise tax Act, a copy of which appears in the appendix to this brief. Section 1 of the Act attempts to impose a franchise tax equal to three-fortieths of one per cent. of the par value of the outstanding capital stock **and surplus** of all corporations organized and doing business solely in Missouri. Section 1 of said Act further attempts to impose a franchise tax upon all corporations organized in Missouri and doing business in that State and in other states (in which class appellant falls), equal to three-fortieths of one per cent. of their **capital stock** employed in Missouri. For the purpose of the Act, Section 1 further provides that each corporation shall be deemed to have employed in Missouri that proportion of its entire outstanding capital stock and surplus that its property and assets in Missouri bears to all its property and assets wherever located. All such corporations are required to report to the State Tax Commission of Missouri annually according to a form prescribed by the Act.

certain facts, among which are the amount of capital stock issued and outstanding, the amount of capital stock paid up, its par value, its clear market value, surplus and undivided profits, the clear market value of property and assets in the State, the clear market value of property and assets without the State, and the clear market value of its total capital stock, surplus, property and assets. From the facts so reported and from any facts within or coming to the knowledge of the Tax Commission it is required to determine and assess the tax. Failure to pay the tax when due results in heavy penalties, and the taxes and penalties are made a first lien upon all the property of the corporation in the State. By Section 10 of the Act, corporations which employ all their property and all their outstanding capital in Missouri are not required to set out in their report to the Tax Commission the value of their property.

Under this Act the Tax Commission assessed against appellant as franchise tax for the year 1919 the sum of \$92,119.98. In arriving at this amount the Tax Commission found and determined that the value of appellant's property in Missouri was \$122,826.652.00, that the par value of its outstanding capital stock employed in Missouri was \$21,625,830.00, and although appellant reported that it had no surplus the Tax Commission deducted the par value of its outstanding capital stock employed in Missouri, to

wit, \$21,625,820.00, from the total value of its assets in Missouri, to wit, \$122,826,652.00, and determined that the remainder, to wit, \$101,200,822²², was ~~surplus~~ within the meaning of the Act. As the tax based on capital stock is by the Act separate from the tax based on surplus, the Tax Commission in arriving at this so-called surplus deducted the par value of the capital stock aforesaid from the gross assets but did not deduct any other liability or indebtedness therefrom.

After this tax was assessed against appellant, the Marquette Hotel Investment Company, a Missouri corporation engaged solely in business in Missouri, instituted proceedings in the Supreme Court of that State by certiorari, attacking the validity of the finding of the Tax Commission which had assessed a tax against it on the same theory as to surplus as the tax was assessed against appellant. The only question involved in that case was the construction of the word "surplus" as used in the Act. *State ex rel. Marquette Hotel Investment Company v. Williams, et al.*, 221 S. W. 721. The Supreme Court of Missouri adopted said Tax Commission's construction of the word "surplus" in an opinion finally entered after the institution and submission of the present suit.

On April 20, 1920, and before a final decision in the Marquette case, appellant instituted this pro-

ceeding in a district court sitting in Missouri, having proper jurisdiction, in which a permanent injunction was sought against the State Treasurer and the Attorney General of the State to enjoin them from taking any steps under the Act or otherwise from attempting to collect the tax assessed against appellant. In the petition for injunction (Rec. pp. 8 to 13) the Franchise Tax Act is attacked as unconstitutional, both in respect of the Missouri Constitution and the Federal Constitution. The tax itself was assailed as having been unconstitutionally determined by the State Tax Commission. At the trial voluminous record evidence was introduced by appellant consisting of records of the State Tax Commission and the State Board of Equalization of Missouri for the purpose of establishing the invalidity of the tax. These records showed that other railroad companies similarly circumstanced as appellant and having property in Missouri, in some instances of greater value and in other instances of not materially less value than appellant, were assessed a franchise tax by the Tax Commission grossly out of proportion to that assessed against appellant. The total combined tax assessed against two of the railroad companies, whose combined properties were valued by the State Tax Commission greatly in excess of the valuation placed by it upon appellant's property, did not equal the tax assessed against appellant.

It will be observed that the Franchise Tax Act contains no provision for a hearing by any taxpayer at any time before or after his tax is finally determined by the Tax Commission. It will further be observed that the same Commission that determines the franchise tax determines the value of the property of the railroad companies for the purpose of ad valorem taxation, and although the Tax Commission had in its records its valuation of the property of other corporations, yet in the administration of said Act it totally ignored these valuations in assessing the tax in controversy. By the terms of said Act a tax was based upon all capital stock of appellant employed in the State of Missouri. There is no restriction to intrastate commerce in determining what part of the capital stock of a corporation is used in Missouri for the purposes of said Act, and such corporation is deemed to have employed in said State that proportion of its entire outstanding capital stock and surplus that its property and assets in said State bear to all its property and assets wherever located. In construing said Act in the Marquette Hotel Investment Company case, *supra*, the Supreme Court of Missouri, in determining the meaning of the word "surplus", denied the right of the corporate tax payer to deduct its indebtedness incident to the business by it conducted, and held that "franchise taxes, to be fair, should be measured by

the volume of business". The Act so construed was applied in assessing the tax against appellant of which it now complains. By so doing, it is contended, a direct tax was assessed against appellant's interstate commerce, the amount of which was largely determined by the volume of its interstate business and constituted a direct burden on such business—not on undivided profits, but on such business and the volume thereof, irrespective of whether the business was profitable or otherwise.

An Act of the Missouri Legislature of 1901, contained in Missouri Statutes 1909, as sections 11551 and 11552, provides for the taxation of all the franchises of all railroad corporations, other than the right to be a corporation, and prescribes a method for ascertaining the values for that purpose. Under that Act, both tangible and intangible property of corporations are assessed and taxed, and appellant, for the year 1909, was assessed and paid as franchise taxes on the valuation of \$4,500,075.10. This was in addition to its advalorem taxes (Rec. p. 64).

When appellant acquired its charter from the State of Missouri it paid to the State a tax of \$225,025, by which it acquired the right to be a corporation within said State for a fixed term of years (Rec. p. 61).

By this suit, praying for an injunction, there were raised questions of the constitutionality of said Franchise Act, both under the constitutions of the State of

Missouri and of the United States; there was also raised the issue that during the year 1919 the United States Government took charge of and operated the railroad and properties of appellant, and that appellant was deprived of the use and exercise of its franchise for that period for which the tax in question was assessed; further, there was raised the question that federal courts are not bound by the construction of said Franchise Act by the Supreme Court of Missouri in the Marquette Hotel Investment Company case aforesaid, and that the interpretation of said Act by said court is erroneous, and when applied, as construed by said court, and as administered by the State Tax Commissioner, is unconstitutional.

The questions raised as aforesaid are specifically set forth in the specification of errors following herewith.

SPECIFICATION OF ERRORS.

The decree of the trial court is erroneous in the following particulars:

(a) In failing to consider and determine appellant's contention that the Missouri Franchise Tax Act of 1917 is in violation of Sections 3, 4, 5 and 21 of Article 10, or one or more thereof, of the Constitution of Missouri, as constituting double taxation, and in holding and decreeing that all taxes of appellant, other than its right to be a corporation, were not assessed against appellant under the provisions of Section 11551 and 11552 Revised Statute, 1909, of Missouri, and in holding and decreeing that the Legislature of Missouri had the right to impose a further tax on appellant, to-wit, the franchise tax in controversy.

(b) In failing to hold and decree that by reason of the fact that appellant was deprived by the Government of the United States of the privilege of doing business, and of the exercise of its corporate franchise in the State of Missouri, during the whole and every part of the year 1919, appellant thereby was not subject to the imposition of the tax in controversy.

(c) In failing to hold and decree that the franchise tax should be measured solely by the capital stock of appellant employed in Missouri as required by Section 1 of the Act.

(d) In failing to hold and decree that said Franchise Tax Act is unconstitutional and void because in violation of Section 1, Article 14 of the Federal Constitution, which provides that no person shall be deprived of property without due process of law, in that said Act contains no provision for any notice, hearing or review for the taxpayer before or after assessment of the tax.

(e) In holding and decreeing that the State taxing authorities of the State of Missouri correctly interpreted and applied the word "surplus" as used in said Act, and in further holding and decreeing that said court was bound by the decision of the Supreme Court of Missouri respecting the interpretation and application of said word "surplus".

(f) In failing to hold and decree that the State taxing authorities, in administering the Act of 1917, unlawfully and unconstitutionally discriminated against appellant by assessing its tax greatly in excess of and out of all proportion to taxes assessed against other railroad companies in Missouri, similarly circumstanced as appellant, in violation of Section 1, Article 14 of the Federal Constitution, thereby denying to appellant the equal protection of the law, and in violation of Section 3, Article 10 of the Constitution of Missouri, requiring uniformity in taxation.

(g) In holding and decreeing that the franchise tax in controversy is not a direct burden upon or inter-

ference with interstate commerce, and that the State of Missouri had the lawful authority to impose said tax, and that the same is in nowise a violation of Sections 8 and 10 of Article I of the Constitution of the United States, and in further holding and decreeing that said Act and the tax assessed against appellant thereunder do not involve property of appellant beyond the limits of the State of Missouri which is not subject to taxation within said State.

(h) In holding and decreeing that said Act, as construed by the Supreme Court of Missouri, and as applied by the State Tax Commission, was not an interference with and unduly burdensome on interstate commerce, in violation of Sections 8 and 10, Article I of the Constitution of the United States, and in failing to hold and decree that the measurement of the tax under said Act was arbitrary, unreasonable, and unduly burdensome on interstate commerce, in violation of Sections 8 and 10 and of Section 1 of Article 14 of the Constitution of the United States.

(i) In holding and decreeing that said Act is valid, and in refusing to grant a temporary injunction as prayed by appellant, and in failing to hold and decree that appellant did not and does not, in fact, owe said franchise tax in the sum of \$92,119.98, and in holding and decreeing that appellant owes of said franchise tax so assessed, the sum of \$75,900.62.

BRIEF OF THE ARGUMENT.

1.

DOUBLE TAXATION IN MISSOURI IS PROHIBITED BY THE CONSTITUTION OF THAT STATE. UNDER THE PROVISIONS OF SECTIONS 11551 AND 11552 REVISED STATUTES OF MISSOURI 1909, APPELLANT PAID ALL FRANCHISE TAXES TO WHICH IT COULD BE SUBJECTTED AND THE ATTEMPT TO IMPOSE A FURTHER TAX ON APPELLANT UNDER THE FRANCHISE TAX ACT OF 1917 CONSTITUTES DOUBLE TAXATION, AND THE ACT UNDER WHICH IT IS ASSESSED IS UNCONSTITUTIONAL IN THAT IT VIOLATES SECTIONS 3, 4, 5 AND 21 OF ARTICLE X OF THE MISSOURI CONSTITUTION. IF THE ACT ATTEMPTS TO IMPOSE A TAX UPON APPELLANT'S RIGHT TO BE A CORPORATION, IT VIOLATES SECTION 10, ARTICLE I, OF THE FEDERAL CONSTITUTION, IN THAT IT IMPAIRS APPELLANT'S CHARTER CONTRACT WITH THE STATE.

An Act of the Missouri Legislature, approved March 9, 1901, entitled "An Act to provide for the assessment and taxation of franchises" (Laws of Missouri, 1901, p. 232; Secs. 11551, 11552, Revised Statutes 1909 of Missouri), omitting Section 3, which is the emergency clause, is as follows:

"Section 1. The franchises (other than the right to be a corporation) of all railroad, street railroad, bridge, telegraph, telephone, conduit, water, electric light and gas companies, and of all other similar corporations owning, operating and managing public utilities, and of all quasi public corporations possessing special and peculiar privileges and authorized by law to perform any

public service (except corporations formed for religious, educational and benevolent purposes), shall be assessed for the purposes of taxation at the same time and in the same manner as other property of such corporation, is now or may hereafter be required to be assessed; and there shall be levied upon the assessed value of such franchise the same rate of taxation as may be levied upon other property of such corporation. Said tax shall be due and payable, and like proceedings may be had to collect the same, and when collected, it shall be disposed of in the same way as the taxes imposed upon the other property of such corporation.

“Section 2. The state board of equalization, in cases of railroads, street railroads, bridges, telegraph, telephone companies and all other corporations, whose property the state board of equalization is now or may hereafter be required to assess, and the county assessor, in case of the other quasi public corporations referred to in the preceding section, shall ascertain, fix and determine the total value for taxable purposes of the entire property of such corporation, tangible and intangible, in this state, and shall then assess the tangible property and deduct the amount of such assessment from the total valuation and enter the remainder upon the assessment list or in the assessor's books, under the head of “all other property”.

Section 3, Article X, of the Constitution of Missouri, is as follows:

“Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.”

Section 4, Article X, of the Constitution of Missouri, is as follows:

“All property subject to taxation shall be taxed in proportion to its value.”

Section 5, Article X, of the Constitution of Missouri, is as follows:

“All railroad corporations in this State, or doing business therein, shall be subject to taxation for State, county, school, municipal and other purposes, on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock.”

Section 21, Article X of the Constitution of Missouri, is as follows:

“No corporation, company or association, other than those formed for benevolent, religious, scientific or educational purposes, shall be created or organized under the laws of this State, unless the persons named as corporators shall,

at or before the filing of the articles of association or incorporation, pay into the State treasury fifty dollars for the first fifty thousand dollars or less of capital stock, and a further sum of five dollars for every additional ten thousand dollars of its capital stock. And no such corporation, company or association shall increase its capital stock without first paying into the treasury five dollars for every ten thousand dollars of increase: Provided, That nothing contained in this section shall be construed to prohibit the General Assembly from levying a further tax on the franchises of such corporation."

It is the law of Missouri that under the foregoing constitutional provisions double taxation is denounced.

The State v. St. Louis, K. C. & N. Railway Co.
et al., 77 Mo. 292;

State *ex rel.* v. Railroad, 196 Mo. 523, l. e.
535, 536.

The Supreme Court of Missouri has adopted in State *ex rel.* v. Railway Company, 140 Mo. 539, l. e. 548, the definition of the word "franchise" given by this Court in Railroad v. Commissioners, 112 U. S. 619, as follows:

"The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corpora-

tion belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such, are the franchises of the corporation."

In *State ex rel. v. Roach*, 267 Mo. 300, l. c. 311, it is said:

"The franchises of a railroad company are divisible into two classes: (1) The mere right of being a body corporate, (2) all other grants of power or privileges by the sovereign power. The first is not subject to barter and sale, but those rights and privileges falling within the second division, *supra*, are subject to barter and sale. In this case, among those rights or franchises, was the right to carry passengers and freight from point to point in Missouri; in other words, was the right to do an intrastate business as a railroad. This franchise or right was subject to sale or mortgage along with the physical property."

The Supreme Court of Missouri in *State ex rel. Marquette Hotel Investment Company v. State Tax Commission*, 221 S. W. 721, held that the franchise tax levied by the Missouri Act of 1917 is not a tax upon property itself "but upon the right of the corporation to transact business in this State." In that case the constitutionality of the 1917 Act was not involved, the sole question presented being the proper interpre-

tation of the word "surplus" as used in the Act. This construction of the nature of the tax was adopted by the District Court in its opinion in the present case.

The State of Missouri under the Act of 1901, *supra*, assessed and collected a tax on all the property of appellant in Missouri, tangible and intangible, the intangible property being classified under the head "all other property" and amounting to \$4,795,961.60, and this tax was paid (R. pp. 61, 62, 63, 64, 65, 67, 68, 69, 70). In assessing this tax all of the franchises of appellant, other than the right to be a corporation, were taxed. One of those franchises was the right to transact business in Missouri. The attempt to impose a further tax upon this franchise is in violation of the provisions of the Constitution of Missouri above set forth as interpreted and applied by the Supreme Court of that State. The Act of 1901 rests upon Sections 5 and 21 of Article X of the Missouri Constitution. Section 21 provides for the payment of incorporation fees as a prerequisite to the grant of a charter with the provision that the General Assembly may levy a further tax on the corporation's franchises. This "further tax" was levied under the Act of 1901, and there is no provision, constitutional or otherwise, for levying an additional "further tax" such as the franchise tax for 1919 in controversy.

There is no suggestion in the 1917 Act of legislative intent to attempt to impose a franchise tax upon the right to be a corporation. The Act in its entirety clearly expresses an intention to lay a tax upon the privilege of transacting business in the State. This was the view of the Missouri Supreme Court expressed in the Marquette case. The right to continued existence was given to appellant by the payment of the corporate fees of approximately \$225,000 (Rec. 61) prescribed by Section 21, Article X, of the Missouri Constitution. The payment of those fees did not, however, exempt the corporation from the imposition of taxes on its franchises other than the right to be a corporation. All of those franchises have been taxed under the Act of 1901, and appellant has paid such taxes for the year 1919. Appellant's charter is a contract with the State, and under that charter it has the right of existence as a corporation for a given number of years. An attempt to impose as a prerequisite to its continued existence the franchise tax on the right to be a corporation would be void, not only because no authority therefor exists under the Missouri Constitution but such an attempt would impair appellant's contract in violation of Section 10, Article I, of the Constitution of the United States.

2.

THE TAX IMPOSED WAS ON APPELLANT'S RIGHT TO TRANSACT BUSINESS IN MISSOURI DURING THE YEAR 1919. AS APPELLANT'S RAILROADS AND PROPERTY WERE IN POSSESSION OF AND OPERATED BY THE FEDERAL GOVERNMENT DURING THAT ENTIRE YEAR IT WAS NOT DOING BUSINESS IN MISSOURI, AND THE PRIVILEGE BEING THUS DENIED THE TAX COULD NOT BE IMPOSED.

During all of the year 1919 appellant's railroad was in the possession of and operated by the Government. The only business in which appellant was authorized to engage was that of conducting and operating a railroad. Under the Act of Congress approved March 21, 1918, Chapter 25, 40 Stat., commonly known as the "Federal Control of Railroads Act", the Government took out of appellant's possession all its railroads and operated them solely through Governmental agencies, and appellant during the entire year of 1919 was deprived of the use thereof for all purposes. During that year appellant did not transact business as a railroad company. The tax under the Act of 1917 is imposed upon the right of a corporation doing business in Missouri to do such business. When that right is taken away by the Government (to which both the State and appellant must yield), the State cannot collect a tax from appellant for doing what the Government has prohibited it from doing. Nor can the State require the Government to pay the tax.

The Corporation Tax Law of 1909 (36 Stat. 112, U. S. Comp. Stat. 1913, See. 6300) was before this Court in *United States v. Emery etc. Realty Company*, 237 U. S. 28, and it appearing that the only business done by the Realty Company was to keep up its corporate organization and to collect and receive rent from its single lessee, this Court held that it was not doing business within the meaning of the law, and therefore was not subject to the tax.

In *McCoach, Collector, v. Minehill etc. Railroad*, 228 U. S. 295, this Court held that the Corporation Tax Act imposed a tax upon the doing of corporate business, and that a railroad corporation which had leased its railroads to another company, operating it exclusively, but which maintained its corporate existence and collected and distributed to its stockholders rentals from its lessees and dividends from investments, was not doing business within the meaning of the Act and was therefore not subject to the payment of the tax.

In *Public Service Railway Company v. Herold*, 229 Fed. 902, the Circuit Court of Appeals for the Third Circuit held that the Corporation Tax Law imposed the tax upon the privilege of carrying on or doing business in a corporate capacity, and that certain corporations having prior to the passage of the Act leased their property and franchises, and not

being engaged in business during the years for which the tax was imposed, were not subject to the payment of the tax.

In *State of Ohio v. Harris*, 229 Fed. 892, an Ohio State franchise tax was attempted to be collected from an insolvent domestic corporation in the hands of a receiver, and it was held that the purpose of the statute being to tax corporations which are in control of their property and engaged in the exercise of their franchises, the tax could not be collected.

The test applied in the foregoing cases, namely, Was the corporation engaged in transacting business, should be applied in the present case. If a corporation voluntarily divesting itself of the means for transacting business is not subject to the tax, a corporation divested of such means by the Government itself should not be required to respond thereto.

3.

THE TAX UNDER THE ACT OF 1917 IMPOSED ON DOMESTIC CORPORATIONS TRANSACTING BUSINESS IN OTHER STATES AS WELL AS IN MISSOURI IS BASED SOLELY ON THE AMOUNT OF CAPITAL STOCK OF SUCH CORPORATIONS EMPLOYED IN BUSINESS IN MISSOURI. THE TAXING AUTHORITIES IGNORED THE PLAIN MANDATE OF THE STATUTE IN ASSESSING THE TAX IN CONTROVERSY.

Section 1 of the Act of 1917, is as follows:

“Every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual

franchise tax to the state of Missouri equal to threefortieths of one per cent of the par value of its outstanding capital stock and surplus, or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to threefortieths of one per cent of its capital stock employed in this state, and for the purposes of this act such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located. Every corporation, not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the state of Missouri equal to threefortieths of one per cent of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this act such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located; provided, that this act shall not apply to corporations not organized for profit, nor to express companies, which now pay (pay) an annual tax on their gross receipts in this state; and insurance companies, which pay an annual tax on their gross premium receipts in this state."

This section is the taxing clause of the Act and is therefore its very essence. There is no other taxing clause in the Act, and the authority to tax must rest upon this section. The first clause of the section imposes a franchise tax equal to three-fortieths of one per cent of the par value of the outstanding capital stock **and surplus** of Missouri corporations engaged in business in that state alone. The second clause of the Act deals with Missouri corporations engaged in business in Missouri and other states, and as to such corporations the tax is imposed **only upon the capital stock** employed in Missouri. The language of the Act imposing the tax under the two conditions above stated is free from ambiguity. Those clauses clearly express the legislative intent. The plain and unequivocal language of the second taxing clause which applied to appellant was utterly ignored by the State Tax Commission in determining appellant's franchise tax for 1919. The Tax Commission, while recognizing that appellant was engaged in business in other states as well as in Missouri, either ignored that fact in determining its franchise tax for 1919 and imposed the tax under the first clause of the section, or wrote into the second clause of the section the words "and surplus" and assessed the tax under the second section as amended by it. The Tax Commission had no authority to write the words "and surplus" into the second clause, nor had it any authority to impose the

tax under the first clause. If the Tax Commission could use surplus at all in dealing with appellant under the Act, it could only use it under the clearly expressed taxing provision of the Act to determine the amount of appellant's capital stock employed in Missouri and made the basis of the tax, which is conceded to be \$21,625,830.00 (Rec., p. 58).

In *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, l. e. 416, the following language was used:

“The citizen is exempt from taxation, unless the same is imposed by clear and unequivocal language, and where the construction of a tax is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid.”

In *Gould v. Gould*, 245 U. S. 151, l. e. 153, this language is used:

“In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.”

In *Eidman v. Martinez*, 184 U. S. 578, l. e. 583, this language is used:

"It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language. * * * We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language."

In *Swan & Finch Co. v. United States*, 190 U. S. 143, l. e. 146, the following language is used:

"Where the burden is placed upon a citizen, if there be doubt as to the extent of the burden it is resolved in favor of the citizen, but where a privilege is granted any doubt is resolved in favor of the Government."

The rule in Missouri is announced in the following decisions:

In *State ex inf. Crow v. Railway Company*, 146 Mo. 155, l. e. 169, the following language is used:

"The courts cannot venture upon the dangerous path of judicial legislation to supply omissions, or remedy defects in matters committed to a co-ordinate branch of the Government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for

them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers."

In *Bankers' Life Co. v. Chorn*, 186 S. W. 681, L. e. 685, the following language is used:

"It is our province to expound and construe, on proper occasions, the laws as they appear on the statute books; but we cannot supply the *casus omissus* without usurping the peculiar prerogative of the law-making body."

In *State ex rel. Koehn v. Lesser*, 237 Mo. 310, L. e. 318, the following language is used:

"But conceding that the State has the power to tax such interests, it does not follow that such interests are taxed unless the law so declares. It is not left to the tax assessor or tax collector to say what property or what interests in property are to be taxed. Under our system of taxation there can be no lawful collection of a tax until there is a lawful assessment and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose."

In *Leavell v. Blades*, 237 Mo. 695, L. e. 700, the following language is used:

"When the tax gatherer puts his finger on the citizen he must also put his finger on the law permitting it."

In State *ex rel.* Carleton D. G. Co. v. Alt, 224 Mo. 493, L. e. 513, the following language is used:

“It is axiomatic in this State that the authority to tax a citizen must be found in the written laws and not left to a matter of inference or implication.”

4.

THE ACT OF 1917 IS IN VIOLATION OF SECTION 1, ARTICLE XIV, OF THE FEDERAL CONSTITUTION, IN THAT IT FAILS TO PROVIDE FOR ANY NOTICE, HEARING OR REVIEW FOR THE TAXPAYER EITHER BEFORE OR AFTER THE ASSESSMENT OF THE TAX OR THE IMPOSITION OF THE SEVERE PENALTIES THEREIN DENOUNCED.

Under Section 3 of the Act the Tax Commission is required on or before February twentieth in each year to determine from the facts reported by the corporation, and from any facts within or coming to its knowledge, the amount of the tax the corporation is liable to pay, and report the tax to the State Auditor who makes out a tax bill and delivers it to the State Treasurer. The tax becomes delinquent on April fifteenth of the same year, and is due and payable without notice. The tax is a first lien on all the property of the corporation within the State (See, 7), and if not paid by May first the Attorney General shall proceed to collect the same with a penalty of twenty five per cent and interest at the rate of one per cent per month (See, 8).

The above provisions are so drastic that it may be said the Act is unconstitutional for that reason; it must be true that the Act is unconstitutional because it contains no provision whatever for any notice, hearing or review, either before or after the assessment of the tax, or before or after the severe penalties are incurred and the lien created upon the corporation's property.

In *Coe v. Armour Fertilizer Works*, 237 U. S. 413, a statute of Florida, relating to the liability of stockholders for judgment debts of the corporation, was under consideration, and the statute was attacked as in violation of the "due process" clause of the Fourteenth Amendment in that the statute contained no provision for notice to a stockholder sought to be charged as such following a return of "no property" upon an execution against the corporation. This Court held, i. e. 422, 423, that the statute in that respect was repugnant to the "due process" clause which entitled the stockholder to a hearing or an opportunity to be heard. The opinion at page 424 uses the following language:

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart v. Palmer*, 74 N. Y. 183, 188, which involved the validity of a statute providing for

assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the Court said: "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. **The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.**"

In the Coe case the opinion quotes from Security Trust etc. v. Lexington, 203 U. S. 323, 333, as follows:

"If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, un-called for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice **is provided for by the statute.**"

In the Coe case the Court further quotes from Central of Georgia Railroad Co. v. Wright, 207 U. S. 127, 138, as follows:

"This notice must be provided as an **essential part of the statutory provision**, and not awarded as a mere matter of favor or grace."

To the same effect are Embree v. K. C. & L. B. Road District, 240 U. S. 242; Londoner v. Denver, 210 U. S. 373, and Turner, Executor, v. Wade, Sheriff, decided November 8, 1920, by this Court.

5.

THE STATE TAXING AUTHORITIES ERRONERILY INTERPRETED AND ADMINISTERED THE ACT OF 1917 BY FAILING TO GIVE TO THE WORD "SURPLUS" IN SAID ACT ITS PLAIN, USUAL, AND CUSTOMARY MEANING AS EXCESS OF ASSETS OVER LIABILITIES, AND IN ERRONERILY INTERPRETING AND APPLYING THE WORD "SURPLUS" AS DENOTING GROSS ASSETS OF APPELLANT LESS ONLY ITS LIABILITY TO ITS STOCKHOLDERS IN RESPECT OF THEIR CAPITAL STOCK.

A taxing act may be constitutional, yet the administering of the act be unconstitutional (*Greene v. Louisville and L. R. Co.*, 244 U. S. 499; *Louisville and N. R. Co. v. Greene* 244 U. S. 522).

This Court will determine the constitutionality of a state tax upon its own judgment of the actual operation and effect of the tax, irrespective of its form and how it is characterized by the state court. This Court is not bound by the decision of the state court if the effect of the decision is violation of the Federal Constitution. Neither is this Court bound by the decision of a state court as to the method of taxation if the state constitution was not questioned in the state court.

Johnson v. Wells Fargo Express Co., 239 U. S. 234, involved the validity of a state tax on the property of the Express Company. The state constitution required taxes to be uniform. A Legislative Act required a state agency on report made to it by the Express Company to determine the value of the prop-

erty and levy the tax. The state agency used as the basis for determining the tax the amounts the Express Company had paid to railroad companies, and the state court upheld that method. This Court held that the method was unconstitutional notwithstanding the decision of the state court.

In *St. Louis S. W. Railway Co. v. Arkansas*, 235 U. S. 350, the validity of a franchise tax, limited to intrastate business was involved, and it was held, *i. e.* 362,

"When the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

In *Galveston H. etc. Railway v. Texas*, 210 U. S. 217, a tax was imposed upon railway companies equal to one per cent of their gross receipts, and the tax so levied was assailed by the Railway Company. This Court held, *i. e.* 227,

"Neither the state courts nor the legislature, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

In *Mountain Timber v. Washington*, 243 U. S. 219, involving a workmen's compensation act, it is held, *i. e.* 237,

"We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect."

In *Shaffer v. Carter*, 40 Sup. Ct. Rep. 221, involving an income tax law of Oklahoma, the Court held, *i. e.* 226,

"Where the question is whether a state taxing law contravenes rights secured by that instrument (Federal Constitution), the decision must depend not upon any mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed."

When this case was submitted in the District Court the *Marquette Hotel Investment Company case* (221 S. W. 721) was pending in the Supreme Court of Missouri on a motion for rehearing. In that case the franchise tax of 1917 was first presented to that Court, and the only question involved was the interpretation of the word "surplus". The decision of the State Supreme Court was not then final (*Andrews v. Vir-*

ginian Railway Co., 248 U. S. 272, L. c. 273; Chicago & W. Railroad Co. v. Basham, 249 U. S. 164, L. c. 167; Childs v. Railway, 117 Mo. 414, L. c. 428; State *ex rel.* v. Ellison, 267 Mo. 321, L. c. 326.) The District Court, notwithstanding these decisions, held that the construction by the State Supreme Court of the word "surplus" was not only binding upon it but it controlled in that construction. No question involved in the present case except the construction of the word "surplus" as used in the Act has been before the State Court, and the construction given to that word by the State Court is not binding on this Court. The Marquette case was decided April 5, 1920, and the final opinion filed April 18, 1920 (221 S. W. 721). The tax against this appellant was assessed on or about September 12, 1919 (Rec., p. 59), and the lien of the tax under the Act, if the Act and the tax be valid, was imposed when the tax was determined. Appellant's rights and its liabilities were then fixed.

In Kuhn v. Coal Company, 215 U. S. 349, an action of trespass was brought involving contract rights. The state court had passed on the same question in a similar case against the same defendant by another plaintiff. The Circuit Court of Appeals certified to this Court the question: Was the Circuit Court of Appeals bound by the decision of the Supreme Court, the said case having been decided after the contract was executed, after the injury was sustained, and

after the present action was instituted. This Court answered the question in the negative, and in the discussion held that it was not bound simply because the state court in a **single case** to which Kuhn **was not a party** and which was determined **after** the right of the present parties had accrued under their contract and **after** the injury complained of had accrued, took a different view of the law. This Court in reviewing the authorities emphasizes the fact that the State Supreme Court of Kentucky had only decided one case on this subject, and that it was determined after the rights of the present parties accrued. To the same effect are *Burgess v. Seligman*, 107 U. S. 20, and *United States v. Cargill*, 263 Fed. 856.

The construction of the word "surplus" as used in the Franchise Tax Act is therefore open to this Court notwithstanding the decision in the Marquette case, and this Court has the right to determine the validity of the tax against appellant and the validity of the method by which it was determined and assessed.

It is a decisive canon of construction that where a word which has a known legal meaning is used in a statute it must be presumed that the word is used in its ordinary sense in the absence of an indication of a contrary intent (The Abbotsford, 98 U. S. 440, 444; *N. C. Cool v. Smith*, 1 Black 459, 464, 470). It is also presumed that the Legislature used and intended to use words in a statute in their

usual sense at the time the law was passed unless it clearly appears that it intended to use them in a more restricted or different sense (St. L. S. F. R. R. Co. v. Furry, 52 C. C. A. 518, 526, 114 Fed. 898, 906).

Section 8057, Revised Statutes 1909 of Missouri, requires:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." * * *

State legislatures almost invariably base a franchise tax on either the capital stock outstanding or the capital stock outstanding and surplus. This has been done in Alabama, Arkansas, Colorado, Delaware, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia and West Virginia. There is no franchise tax law in Connecticut, Louisiana, Michigan,

gan, Minnesota, Mississippi, Nevada, Pennsylvania, South Dakota, Wisconsin and Wyoming. In not one of the states having the franchise tax law have the courts given to the word "surplus" the construction received by it in this case.

As applied to business corporations the word "surplus" has a definite and fixed meaning which is recognized by the courts all over the country, State and Federal. It means excess of assets over liabilities. Among the numerous decisions are the following: *People ex rel. v. Roberts*, 39 N. Y. Sup. 448; *First National Bank v. Moon*, 102 Kan. 334; *Fidelity Trust Co. v. Board of Equalization*, 77 N. J. L. 428; *Leather Mfgrs. National Bank v. Treat*, 116 Fed. 774; *People ex rel. v. Purdy*, 146 N. Y. Sup. 646; *Houston & T. C. R. Co. v. McDonald*, 148 S. W. 287; *State v. Morristown Fire Ass'n*, 23 N. J. L. 195, *Anderson v. Trust Company*, 241 Fed. 342; *State ex rel. v. Utter*, 34 N. J. L. 487; *Lapsley v. Merchants Bank*, 105 Mo. App. 98; *Decker v. Deemer*, 229 Mo. 296; *Southern Insurance Co. v. Milliken*, 154 Ky. 216; *Greeff v. Insurance Co.*, 116 N. Y. 19; *State v. Parker*, 35 N. J. L. 575; *Bank v. Tennessee*, 161 U. S. 134, l. e. 147, 148; also Cole on "Assets, Their Construction and Interpretation," pages 70, 95 and 200.

If the Legislature had intended to give to the word "surplus" a meaning different from its ordinary and definite meaning as applied to business corporations,

it would not have used the words "property," "assets" and "undivided profits" as they appear in the Act. It would not have made the distinction between capital stock and surplus on the one hand and property and assets on the other. It is presumed that the members of the Legislature had ordinary business sense and judgment, and did not intend that "surplus" should be used as the measuring rod to determine "surplus." It is clear from the Act that the Legislature recognized the distinction between "surplus" and property and assets by the manner in which those words are used in the Act. It would not have provided by Section 1 of the Act that a foreign corporation engaged in business in Missouri "should be deemed to have employed in this State that proportion of its entire capital stock and surplus that its property and assets in this State bears to all its property and assets wherever located." If the word was intended to have the meaning given to it by the State authorities the measure of the tax would have been determined by that proportion that its surplus in this State bears to its entire surplus. In the present case the State Tax Commission found that the clear market value of appellant's property and assets, real and personal, in Missouri, was \$122,826,652.00; that the amount of its capital stock employed within this State was \$21,625,830.00. It then deducted the capital stock employed within this State from the clear market value of all its property and assets within the State

and determined that appellant had a surplus in this State of the remainder, to-wit, \$101,200,822.00, notwithstanding the fact that it found that the clear market value of its total issued and outstanding capital stock of a par value of \$57,947,026.00 was only \$8,100,742.00. The Act was passed in 1917, and in assessing the tax for 1918 the Tax Commission deducted all liabilities of appellant from the total value of its assets in Missouri, and appellant paid the taxes for that year on its outstanding capital stock so determined (Rec. p. 147). The Tax Commission as constituted in 1918 devised this new method for determining surplus and transmitted it to the Commission as constituted in 1919, and the franchise tax of some corporations for 1919 was assessed under the old method (Rec. p. 147).

6.

THE STATE TAXING AUTHORITIES IN ADMINISTERING THE ACT OF 1917 UNLAWFULLY AND UNCONSTITUTIONALLY DISCRIMINATED AGAINST APPELLANT BY ASSESSING ITS TAX GREATLY IN EXCESS OF AND OUT OF ALL PROPORTION TO TAXES ASSESSED AGAINST OTHER RAILROAD COMPANIES IN MISSOURI SIMILARLY CIRCUMSTANCED AS APPELLANT, IN VIOLATION OF SECTION 1, ARTICLE XIV, OF THE FEDERAL CONSTITUTION, THEREBY DENYING TO APPELLANT THE EQUAL PROTECTION OF THE LAW AND IN VIOLATION OF SECTION 3, ARTICLE X, OF THE MISSOURI CONSTITUTION REQUIRING UNIFORMITY IN TAXATION.

Under the law in Missouri railroad corporations engaged in business in that State made reports to the

State Tax Commission of the value of their property in Missouri for the purpose ad valorem taxation (Rec. p. 72). The State Tax Commission upon such reports determined the value of such property for such purposes, and these values were adopted by the State Board of Equalization (Rec. p. 72). Under the Franchise Tax Act the same corporations reported to the same Tax Commission the value of their property in Missouri, and under the 1917 Act in question the Tax Commission by Section 3 thereof was required to determine from the facts so reported **and from any facts within or coming to its knowledge** the amount of tax these corporations were required to pay under the Act.

The Chicago, Burlington & Quincy Railroad Company reported to the Tax Commission as the value of its property for advalorem taxation in 1919 \$42,175,794.63, and the valuation for such purposes fixed by the Tax Commission was \$21,462,552.00. The report of that Company upon which the franchise tax was based showed property of the value of \$40,940,662.00, and the amount of franchise tax determined by the Commission against it was \$30,705.00 (Rec. opposite p. 74).

The Missouri Pacific Railroad Company reported to the Tax Commission as the value of its property for advalorem taxation in 1919 \$55,203,122.00, and the valuation for such purposes fixed by the Tax Com-

mission was \$24,567,089.60 (Rec. p. 72). The report of that Company upon which the franchise tax was based showed property of the value of \$36,643,408.00, and the amount of franchise tax determined by the Commission against it was \$27,482.55 (Rec. opposite p. 74).

Appellant reported to the Tax Commission as the value of its property for advalorem taxation in 1919 \$54,756,083.00, and the valuation for such purposes fixed by the Tax Commission was \$24,101,460.00 (Rec. p. 72). The report of that Company upon which the franchise tax was based showed property of the value of \$122,826,652.00, and the amount of franchise tax determined by the Commission against it was \$92,119.98 (Rec. opposite p. 74).

From the foregoing it appears that although the same Tax Commission valued the property of the Chicago, Burlington & Quincy Railroad Company at only about two and one-half millions of dollars less than that of appellant, and valued the property of the Missouri Pacific Railroad Company at over four hundred thousand dollars more than that of appellant, yet in assessing the franchise tax against appellant its property was given a value by the Commission of more than the combined values of the two other companies, and their combined franchise tax was assessed at approximately \$69,000.00 while that of appellant alone was assessed at over \$92,000.00.

Other comparisons from the tabulated statements at page 72 and opposite page 74 of the Record could be made for the purpose of showing the inequality of these taxes by reason of the discriminatory method followed by the Tax Commission in administering the Act.

This emphasizes the reason for the rule enunciated in the opinions of this Court hereinbefore referred to guaranteeing to the taxpayer notice and the opportunity to be heard before a tax against him becomes a finality, and the action of the Tax Commission is directly condemned by this Court in *F. S. Royster Guano Company v. Commonwealth of Virginia*, 40 Sup. Ct. Rep. 560, 1. e. 561, 562, wherein it is held that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, **so that all persons similarly circumstanced shall be treated alike**".

7.

THE SAID FRANCHISE ACT OF 1917, IMPOSES A TAX UPON ALL OF APPELLANT'S CAPITAL STOCK EMPLOYED IN THE STATE OF MISSOURI, WHETHER EMPLOYED IN INTERSTATE OR INTRASTATE COMMERCE OR BOTH. IN CONSTRUING THE SAID ACT IN THE MARQUETTE HOTEL INVESTMENT COMPANY CASE (221 S. W. 721), THE SUPREME COURT OF MISSOURI, IN CONSTRUING THE WORD "SURPLUS", FOUND IN SAID ACT, DENIED THE RIGHT OF THE CORPORATE TAXPAYER TO DEDUCT ITS INDEBTEDNESS INCIDENT TO THE BUSINESS BY IT CONDUCTED, AND HELD THAT "FRANCHISE TAXES, TO BE FAIR, SHOULD BE MEASURED BY THE VOLUME OF BUSINESS"; AND, IN ACCORDANCE WITH THAT CONSTRUCTION, THE TAX WAS ASSESSED OF WHICH APPELLANT COMPLAINS. FURTHER, IN DETERMINING THAT TAX, THE TAX COMMISSION FOLLOWED THE RULE THAT THAT PORTION OF APPELLANT'S CAPITAL STOCK WAS USED IN MISSOURI THAT ITS PROPERTY AND ASSETS IN THE STATE BEARS TO ALL ITS PROPERTY AND ASSETS, WHEREVER LOCATED. THIS REGARDLESS OF THE FACT, AS DISCLOSED BY THE RECORD, THAT APPELLANT IS LARGEY ENGAGED IN INTERSTATE COMMERCE AND THAT ITS PROPERTY USED FOR SAID PURPOSE IS TO A GREAT DEGREE AND TO A DISPROPORTIONATE EXTENT, SITUATED IN THE STATE OF MISSOURI, AND THAT THEREBY APPELLANT WAS TAXED GREATLY IN EXCESS OF AND OUT OF ALL PROPORTION TO WHAT IS JUST AND EQUITABLE, AND THE RULE SO PRESCRIBED BY SAID FRANCHISE ACT IS ARBITRARY, UNREASONABLE AND UNDULY BURDENSONE TO INTERSTATE COMMERCE.

(a) The tax is based upon all the capital stock of appellant employed in the State of Missouri and thereby, it is contended, imposes a burden upon interstate commerce.

With reference to a corporation organized under the laws of the State of Missouri, and doing busi-

ness not only in Missouri, but in another state or country, the act provides for a tax measured by its capital stock employed in the state. It is not limited to intrastate commerce. Under the act any and all property in the state, though used exclusively in interstate commerce, is used in measuring the tax. All equipment pertaining to and used exclusively in interstate business, if at any time or in any manner employed in the State of Missouri, under the express terms of the Act, is subject to the tax therein imposed. Herein this case differs from *St. L. S. & W. Ry. v. Ark.*, 235 U. S. 350. There the Act excluded any imposition upon or interference with interstate commerce. Said this Court, in that case (1. c. 363):

“We therefore accept the construction of Act No. 112, that we have quoted from the opinion of the State Court, which is, in short, that it imposes an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the state, the amount of the tax being fixed solely by reference to the property of the corporation that is within the state and used in business transacted within the state, and excluding any imposition upon or interference with interstate commerce.”

In *Lilou v. Port of Mobile*, 127 U. S. 640, an annual license tax on telegraph companies was involved,

and Leloup, an agent, of the telegraph company was convicted under an ordinance. The Alabama Supreme Court affirmed the judgment of conviction. The tax was sought to be upheld because a portion of the telegraph company's business in the State was intrastate. The Supreme Court held (1. c. 647):

“But the fact does not remove the difficulty, the tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the entire operation of the company.”

And further, it is said no state had the right, in view of the Federal Constitution, (1. c. 648):

“To lay a tax on interstate commerce in any form, whether by way of duties laid on transportation of the subjects of commerce, **or on receipts derived from that transportation or on the occupation or business of carrying it on**, and the reason is that such tax is a burden on that commerce and amounts to a regulation of it which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary. (Citing Cases)”

In *Crutcher v. Ky.*, 141 U. S. 47, the statute involved made it unlawful for an agent of a foreign express company to carry on business in Kentucky without

first procuring a license and certain fees were prescribed to be paid for by the corporation. The fees were on account of the company's business in Kentucky, **no discrimination being made between interstate and domestic business done there.** The Kentucky State Court held the statute constitutional, notwithstanding the lack of such discrimination. The United States Supreme Court reversed the judgment and pointed out distinctly the difference between the power of the state to tax state business and interstate business within its confines. The court further held that the difficulty was not obviated by the fact that the company also did local business within the State.

In *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, this Court treats this subject of interference with interstate commerce, exhaustively, citing a large number of cases and announced the following as the established rule, (l. c. 27):

"But the disavowal of the State for any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid whatever may have been the purpose for which it was

enacted, and although the company may do both interstate and local business. This Court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through the forms to the substance of things."

This question was discussed at length in *Pickard v. Pullman Company*, 117 U. S. 34; and in *Allen v. Pullman Company*, 191 U. S. 171; and in *Crew Levick v. Pennsylvania*, 245 U. S. 292.

In *Wells Fargo Co. v. State of Nevada*, 248 U. S. 165, the Court was considering a tax levied in Humboldt County, Nevada, against property of the express company. The question propounded was:

"Whether the tax was laid on the privilege or act of engaging in interstate commerce, whether the tax proceedings were without due process of law and whether they otherwise were such as to make the tax a burden on the interstate commerce."

Acting under the statute, the State Board valued the company's personal property, tangible and intangible, used in its business within the State, at \$380,00 per mile. Said the Court:

"Looking only at that entry, it is strong ground for saying that the tax was laid on the privilege or act of doing express business, which

was principally interstate. On the other hand, the action of the State Board on which the assessment was predicated indicates that what was taxed was the company's property in Humboldt County. The difference is vital, for consistently with the Commerce Clause of the Federal Constitution, the State could not tax the Plaintiff on account of engaging in interstate commerce, but could tax the company's property within the State, although chiefly employed in such commerce."⁷

Under the Act here considered, it is not property within the State, but the capital stock of the company employed in the State that measures the tax, whether such employment is exclusively in interstate commerce, in both interstate and intrastate commerce, or in intrastate commerce only. It is common knowledge that large railroad companies have vast property interests used in the various states having to do exclusively with interstate commerce. Under the Act here considered, such property, though employed exclusively in interstate commerce, is considered for the reason that such employment is had within the State of Missouri. Such an assessment of the tax, under authorities aforesaid, is an immediate and direct burden upon interstate commerce, and violative of the constitutional provisions aforesaid.

(b) The tax based upon "surplus", referred to in

the Act, and as "surplus" is construed by the Supreme Court of the State of Missouri, imposes an unlawful burden upon interstate commerce.

In the case of State of Missouri, at the relation of Marquette Hotel Investment Co., Relator, v. the State Tax Commission, et al., Respondents, decided by the Supreme Court of the State of Missouri, in May, 1920 (221 S. W. 721), that Court holds that in arriving at what constitutes the "surplus" referred to in said Act, of any corporation, no deductions shall be made of its indebtedness. As so construed by that Court, the "surplus" necessarily varies in proportion to the volume of foreign commerce, and hence is a direct burden upon it, or, as was said by this Court in the State Freight Tax case, 15 Wall., l. e. 297:

"That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."

And, as said in St. Louis L. & W. Ry. Co. v. Ark., 235 U. S., l. e. 363:

"The tax, as will be observed, is not in any way based upon the receipts of the railroad company from interstate commerce. Either taken alone or in connection with the receipts from its intrastate business. Since, therefore, the amount of the imposition is not made to fluctuate with

the volume or the value of the business done, we are relieved from those difficulties that arise where said taxes are based upon the earnings of interstate carriers. (Citing numerous cases.)”

The rule here applicable is made clear upon a consideration of the adjudications of this Court to the effect that where interstate commerce is involved a tax measured in any sense by the gross transactions in such commerce is by its necessary effect a tax upon the commerce and contrary to Sections 8 and 10 of Article I of the Constitution of the United States. Where, however, the tax is effected by imposing an assessment upon the net income of a corporation, it is in effect upon undivided net profits, and the result is not a laying of a tax or duty in contravention of said constitutional provision. *U. S. Glue Co. v. Town of Oak Creek*, 247 U. S. 321.

In the case last cited, this Court very pertinently remarked that:

“The difference in effect between a tax measured by gross receipts and one measured by a net income, recognized by our decisions, is manifest and substantial and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental.”

If "surplus" be interpreted as employed in commercial circles, viz., the amount of assets over liabilities, whether the excess of assets is carried under the name of "surplus" or of undivided profits, it is readily seen that "surplus", as so construed, has lost its interstate character, and the burden upon the business affected is indirect and incidental. If, however, "surplus" be treated in the instant case as defined by the Supreme Court of Missouri, as aforesaid, the tax is not measured by undivided profits which have lost their interstate character, but directly and as an immediate burden by the volume of business. Said the Supreme Court of Missouri, in the Marquette Hotel Investment case, *supra*: "Franchise tax, to be fair, should be measured by the volume of business." (See opinion Motion for Rehearing.) But a tax upon the volume of business of a concern engaged in interstate business, if the indebtedness incident thereto be not deducted, is a direct and immediate burden or tax upon the gross receipts of such business and thereby violative of Sections 8 and 10 of Article I of the Constitution of the United States.

Again, where a tax, as under consideration, in effect is upon the magnitude and volume of a business, without regard to the indebtedness thereof, it is a tax upon commerce, irrespective of whether it is profitable or otherwise. Interstate commerce may not be seriously hampered or burdened by a tax, if re-

stricted to surplus in the nature of undivided profits, but when levied upon the surplus measured by the volume of a business only, the very tax itself may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the business, and thereby discourage interstate commerce. As was said by this Court in *U. S. Glue Company v. Town of Oak Creek*, *supra* (247 U. S. 321):

“Tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss or to so diminish the profit as to impede or discourage the conduct of commerce.”

(c) The measurement of the tax in question, in administering the same, is arbitrary, unreasonable and unduly burdens interstate commerce.

The Act provides that for its purposes a corporation shall be deemed to have employed in the State of Missouri that proportion of its capital stock and surplus that its property and assets in this State bears to all its property and assets wherever located. From the allegations of the bill of complaint and the findings of the State Tax Commission and the evidence (Rec., pp. 6-58-66), it clearly appears that the

business of the appellant is largely interstate commerce. The tax under consideration is a franchise tax, and if valid must be limited to intrastate business. The record shows that of the value of the entire property and assets of the appellant in the total sum of \$329,590,548.00, property and assets of the value of \$122,826,652.00 are located in Missouri. Hence, it appears that, due to expensive terminals, and other valuable property of appellant located in Missouri, a very large and undue proportion of the property of appellant is located in the State of Missouri. This fact, together with the fact that its business is very largely interstate commerce, manifestly makes the rule of measuring the tax in question, as by the Act approved and as administered by the State Tax Commission, unreasonable and unduly burdensome on interstate commerce. Similar methods of assessment of advalorem taxes have been held by this Court indefensible (Wells Fargo Co. v. Hart, 193 U. S. 490; Union Tank Line Co. v. Wright, 249 U. S. 275-282; Geo. Wallace et al. v. Walker D. Hines, Director General, et al., 40 Sup. Ct. Rep. 435).

In the Fargo case, *supra*, the Court said:

“But it is recognized in the cases that, if for instance, a railroad company had terminals in one state equal in value to all the rest of the line

through another, the latter state could not make use of the unity of the road to equalize the value of every mile."

In *Union Tank Line Co. v. Wright*, above cited, it is said:

"In the present case the comptroller-general made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. * * *"

We think Plaintiff-in-Error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit "enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

In the Wallace case, decided by this Court on May 3, 1920 (40 Sup. Ct. Rep. 435), the law purported to provide an excise tax upon business done in the State of North Dakota. As the law was administered, the Tax Commissioner fixed the value of the total property of each railroad by the total value of its stocks and bonds and assessed the proportion of this value that the main track mileage in North Dakota bore to the main track of the whole line. Upon consideration

of that law this Court held in the decision aforesaid that the circumstances were such as made that mode of assessment indefensible; that North Dakota was a state of plains, very different from the other states, and the cost of the roads there was much less than in mountainous regions that the road had to traverse; that the State was mainly agricultural, its markets were outside its boundaries, and most of the distributing centers from which it purchased were also outside; that it naturally followed that the great and very valuable terminals of the road were in other states; that considering only the physical tracks the injustice of assuming the value to be equally distributed according to main track mileage was plain.

The case before this Court is the reverse of the case referred to, for it must be borne in mind that there is here involved a franchise tax, not an *ad valorem* tax, and that the inequality and injustice to which appellant is subjected under the rule of measuring the tax as administered by the State authorities, arise from the fact that the appellant is engaged chiefly in interstate commerce and that its equipment incident to its commerce is largely located in the State of Missouri, whereby a large tax is assessed by the State of Missouri, wherein there is limited intrastate commerce; that is to say, the tax is disproportionate to the use and exercise of the franchise as pertains to intrastate business.

Appellant therefore confidently asserts that the Franchise Tax Act in question, particularly as construed by the Supreme Court of the State of Missouri, constitutes and is a direct burden upon interstate commerce in violation of Sections 8 and 10 of Article I of the Constitution of the United States.

For the foregoing reasons the decree should be reversed.

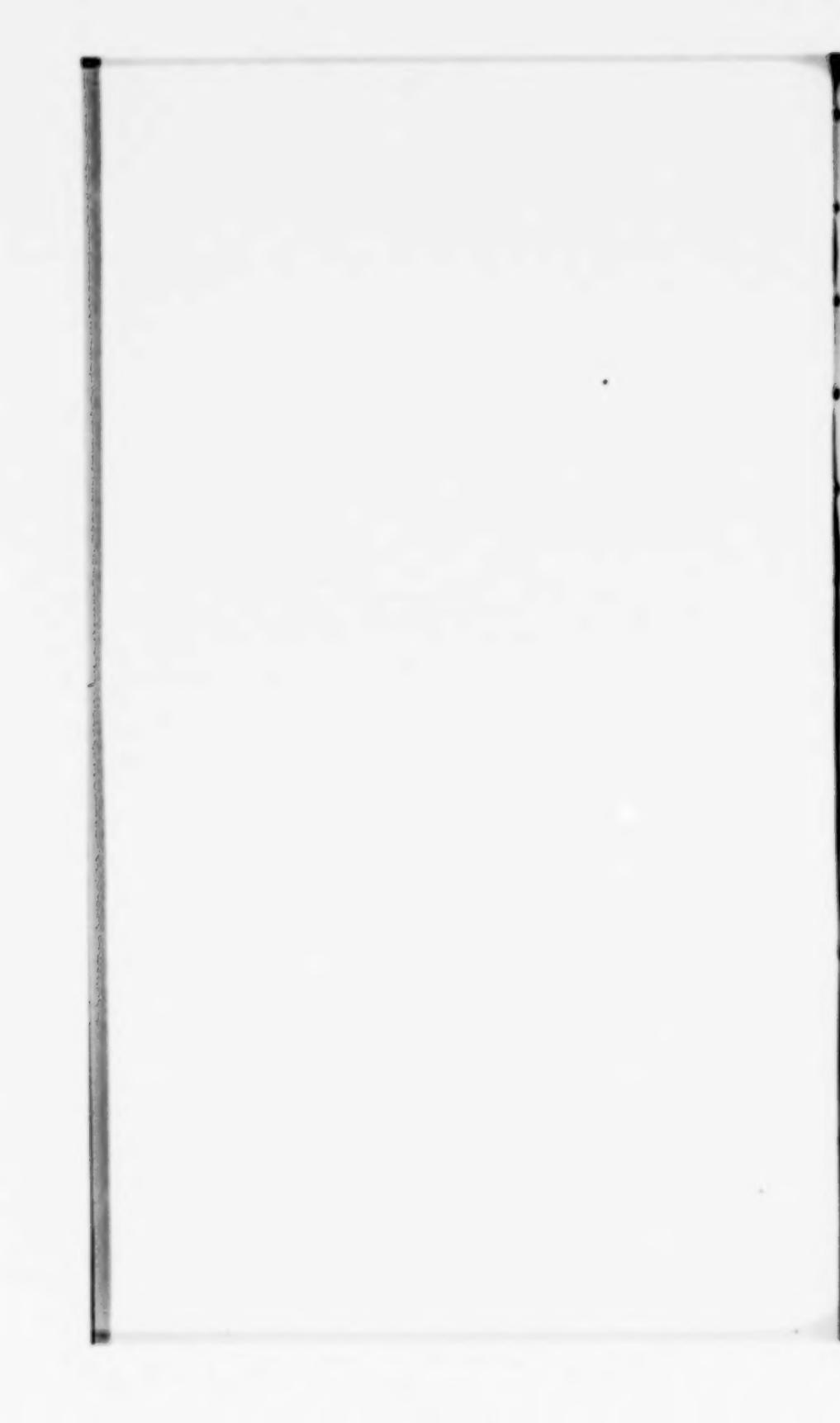
EDWARD T. MILLER,

HENRY S. CONRAD,

Solicitors for Appellant.

WILLIAM F. EVANS,

Of Counsel.



APPENDIX.

CORPORATIONS, PRIVATE: Franchise Tax.

AN ACT requiring domestic corporations and foreign corporations doing business in this state to pay an annual franchise tax; providing the method of procedure for ascertaining the amount thereof and for enforcing collection thereof; establishing a lien in support thereof; prescribing the duties of the state tax commission or of the state board of equalization, the state auditor, the state treasurer and other officers in connection therewith and prescribing the penalties and forfeitures for violations.

SECTION

1. Defining—~~tax~~—rate.
2. Corporations to make report, to whom—when—to contain, what.
3. State tax commission to determine amount—state auditor to make tax bills—when—taxes, when due, etc.
4. Written report, who shall make, etc.
5. Report to contain.
6. State tax commission, duty—annual fees.
7. Taxes to be a lien.

SECTION

8. Delinquents—how collected —penalty.
9. Failure to make report, prosecuting attorney to bring action, etc.
10. Value of property—not to be set out, when.
11. Board may summon witness, take testimony, etc., when.
12. Powers of commission, etc.
13. Failure of commission—state board of equalization to act.
14. Repealing conflicting laws.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Defining—tax—rate.—Every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to three-fortieths of one per cent of the par value of its outstanding capital stock and surplus, or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to three-fortieths of one per cent of its capi-

tal stock employed in this state, and for the purposes of this act such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located. Every corporation, not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the state of Missouri equal to three-fortieths of one per cent of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this act such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located; *provided*, that this act shall not apply to corporations not organized for profit, nor to express companies, which now pay [pay] an annual tax on their gross receipts in this state; and insurance companies, which pay an annual tax on their gross premium receipts in this state.

Sec. 2. Corporations to make report, to whom—when—to contain, what.—Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri tax commission, if it is in existence, and if not, then to the state board of equalization annually on or before the first day of February in such form as said commission or said board of equalization may prescribe. Such report shall be signed and sworn to before an officer duly authorized to administer oaths by the president,

vice-president, secretary, treasurer or general manager of the corporation and shall contain the following:

1. Name of corporation.
2. The location of its principal business office.
3. The names of its president, vice-president, secretary, treasurer, and members of the board of directors, with the residence and postoffice address of each.
4. The amount of authorized capital stock.
5. The amount of capital stock subscribed.
6. The amount of capital stock issued and outstanding.
7. The amount of capital stock paid up.
8. The par value of the stock.
9. The clear market value of the stock.
10. The amount of surplus and undivided profits.
11. The nature and kind of business in which the corporation is engaged and the location of its place or places of business.
12. The clear market value of its property and assets in this state.
13. The clear market value of its property and assets without this state.
14. The clear market value of its total capital stock, surplus, property and assets.
15. The change or changes, if any, in the above particulars made since the last annual report.

Sec. 3. State tax commission to determine amount—state auditor to make tax bills—when—taxes, when due, etc.—The state tax commission, or the state board of equalization, as the case may be, shall, on

or before the 28th day of February in each year, determine from the facts reported, and from any facts within or coming to its knowledge, the proportion of the capital stock and surplus of each corporation employed in business in this state and the amount of the tax each corporation is liable to pay under the provisions of this act and shall report the same to the state auditor, who shall make out a tax bill therefor against each corporation and shall deliver the same to the state treasurer and charge him therewith. The taxes provided for in this act shall be paid on or before the 15th day of April in each year and shall be due and payable to the state treasurer without notice, who shall make out and deliver a receipt therefor, which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this act for the year ending on the 31st day of the following December.

Sec. 4. Written report, who shall make, etc. — Every corporation organized under the laws of this state, and every foreign corporation engaged in business in this state, and having no capital stock shall make a report in writing to the Missouri tax commission, or, if it is not in existence, to the state board of equalization, annually on or before the 1st day of February in such form as said commission or said state board of equalization may prescribe. The report shall be signed and sworn to before an officer authorized to administer oaths by the president, vice-president, secretary, treasurer, or other chief officer of the corporation, and forwarded to said commission or said state board of equalization, as the case may be.

Sec. 5. Report to contain.—Such report so made shall contain the following:

1. The name of the corporation.
2. The location of its principal office.
3. The names of the president, vice-president, secretary, treasurer, and members of the board of directors, with the postoffice address of each.
4. The date of annual election of officers.
5. The nature of the business in which such corporation is engaged.

Sec. 6. State tax commission, duties—annual fees.

Upon the filing of the report provided for in sections 4 and 5 of this act, said commission or said state board of equalization, as the case may be, shall report to the state auditor on or before the 20th day of February of every year who shall charge and certify to the state treasurer on or before August 1st of every year for collection as herein provided a fee of twenty-five dollars for every corporation organized as a mutual insurance corporation not having a capital stock, or any other corporation not organized strictly for religious, charitable, or educational purposes and having no capital stock, or of a company or association organized to transact business of life or accident insurance on the assessment plan for the purpose of mutual protection and benefit to its members and the payment of stipulated sums of money to the family, heirs, executors, administrators, or assigns of the deceased member thereof. All foreign, life, fire, accident, surety, liability, steam boiler, tornado, health, or other kind of insurance company of whatever nature coming within the provisions of section

4 and 5 and doing business in this state having an outstanding capital stock of less than five hundred thousand dollars (\$500,000) shall pay an annual fee of fifty dollars (\$50.00) and all other such insurance companies having a capital stock of more than five hundred thousand dollars (\$500,000) an annual fee of one hundred dollars (\$100.00) for the privilege of doing business in this state and all building and loan associations to pay an annual fee to the state of twenty-five dollars (\$25.00) for the privilege of doing business in this state, in place of the fee based on the capital as hereinbefore provided.

Sec. 7. Taxes, to be a lien.—The taxes and penalties to be paid by the provisions of this act shall be a first lien on all property and assets of the corporation within this state.

Sec. 8. Delinquents—how collected — penalty.—If any corporation fails or refuses to pay the taxes assessed against it under the provisions of this act on or before the first day of May the state treasurer shall certify a list of such corporations so delinquent to the attorney-general, who shall proceed forthwith to collect the same, together with a penalty of twenty-five per cent and interest at the rate of one per cent per month. Suits for the collection of such taxes may be brought in the name of the state in any court of competent jurisdiction and any judgment rendered therein in favor of the state shall be a first lien on all the property and assets of the corporation within this state.

Sec. 9. Failure to make report, prosecuting attorney to bring action, etc.—If any corporation subject to the provisions of this act, shall fail or neglect to make the report herein required, or within the time herein required, such corporation, if organized under the laws of this state shall forfeit its charter, or if a foreign corporation shall forfeit its right to engage in business in this state and the attorney-general or, at his direction, the prosecuting attorney of the county in which such corporation has its principal business office, shall bring an action in the name of the state in some court of competent jurisdiction to annul the charter or revoke the license of such corporation to engage in business in this state.

Sec. 10. Value of property—not to be set out, when.—All insurance companies, building and loan associations, and other corporations, the fees of which are fixed at lump sums by this act, and all corporations which employ all their property and all their outstanding capital stock in this state shall all report and pay the fees on all its outstanding capital stock, whether employed in this state or not, shall not be required to set out in the report required by this act the value of its property within this state or without the state.

Sec. 11. Board may summon witnesses, take testimony, etc., when.—If any corporation subject to the provisions of this act fails or refuses to make full and complete answers to the questions contained in the report required to be filed by it, or if the tax commissioner or state board of equalization, as the case may be, finds that any answer or answers con-

tained in said report are untrue, or if said tax commission or the state board of equalization, as the case may be, has reason to believe and does believe that any corporation has made a false statement or concealed any fact or facts which are material in determining the amount of tax for which such corporation is liable or ought to be liable under the provisions of this act then said commissioners may require the delinquent corporation, its officers, agents or employees to furnish information concerning their capital stock which is necessary in determining the amount of tax to be paid by them and for that purpose said commission or said state board of equalization, as the case may be, may summon witnesses to appear and give testimony and to produce records, books, papers, documents, and all other information of any kind or character required relating to any matter necessary to be ascertained for the purpose of arriving at the amount of such tax to be paid. The witnesses may be summoned by subpoena issued by any member of such commission or the secretary thereof, in the name of the commission, if such commission be in existence, in the name of such board, directed to the sheriff of any county in the state and returnable to said commission or said state board of equalization, as the case may be, which subpoena shall be served in like manner and the same effect and under similar conditions as if issued out of the circuit court. Such commission or the state board of equalization, as the case may be, is also authorized to take depositions of witnesses residing within or without the state or absent therefrom, to be taken upon notice to the interested parties, if any, in like manner that depositions of witnesses are taken in civil

cases in the circuit court in any matter which the commission may have authority to investigate and determine. Oaths of witnesses in any matter under investigation or consideration of such commission or state board of equalization, as the case may be, may be administered by the secretary or any member of such commission or the state board of equalization, as the case may be. In case any witness shall fail to obey any subpoena or summons to appear before said commission or shall refuse to testify or answer any material questions and to produce records, books, papers, or documents when required so to do; such failure or refusal shall be reported to the attorney-general, who shall thereupon proceed in the proper course to compel obedience to any subpoena or summons or proper order of the commission or state board of equalization, as the case may be, and said commission or board may punish witnesses for any improper neglect or refusal.

Sec. 12. Powers of commission, etc. Said commission or said state board of equalization, as the case may be, shall have power to appoint a commissioner to take testimony in any proceeding or inquiry arising under the provisions of this act and such commissioner may take testimony within or without the state and have all the power and authority of said commission or board of equalization to compel witnesses to appear and give testimony and to produce records, books, papers, documents or other evidence; such commissioner shall return all testimony and evidence so taken to the commission or board of equalization and shall be allowed a reasonable compensation and expenses, including stenographic fees. Any

witness who shall knowingly or willfully give false answers to any questions propounded in any such sworn examination where the fact inquired of is within his knowledge shall be deemed guilty of perjury. It shall be unlawful for any member of the Missouri tax commission or any member of the state board of equalization, as the case may be, or for any officer or employee of such commission or such state board of equalization, as the case may be, or for any other officer or employee of the state to divulge or make known in any manner whatever not provided by law to any person, any information obtained by them in the discharge of their official duties; or to divulge or make known in any manner not provided by law any document reviewed or evidence taken or report made under this act. Any offense against the foregoing provisions shall be a misdemeanor and shall be punished by a fine of not exceeding one thousand dollars (\$1,000.00) or by imprisonment in the county jail not exceeding six months.

Sec. 13. Failure of commission—state board of equalization to act.—In the event that the state tax commission is not created or in existence all the powers and duties of such commission under the provisions of this act shall devolve upon and be exercised and performed by the state board of equalization and in such event the state board of equalization may employ such stenographic and clerical and other assistance as may be necessary to the proper carrying out of the provisions of this act.

Sec. 14. Repealing conflicting laws.—All laws or parts of laws in conflict herewith are hereby repealed.

Approved April 9, 1917.

FEB 21 1921

JAMES D. MAYER,
OLYMPIA,

IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Appellant,
v.
LARENZO D. THOMPSON, State Treasurer of the State of Missouri, and JESSE W. BARRETT, Attorney-General of the State of Missouri, Appellees. } No. 636

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, CENTRAL DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF THE ARGUMENT FOR APPELLEES.

JESSE W. BARRETT,
Attorney-General of Missouri,
MERRILL E. OTIS,
Assistant Attorney-General,
FRANK W. McALLISTER,
Solicitor for Appellees.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Appellant,

v.

LARENZO D. THOMPSON, State Treasurer of the State
of Missouri, and JESSE W. BARRETT, Attorney-
General of the State of Missouri, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES, CENTRAL DIVISION
OF THE WESTERN DISTRICT OF
MISSOURI.

BRIEF OF THE ARGUMENT FOR APPELLEES.

STATEMENT OF THE CASE.

We will not undertake a complete restatement of all the facts involved in the case, as appellant's statement is fair for the most part, but we desire to call attention to some matters disclosed by the record which do not clearly appear from appellant's statement.

The tax imposed by the Act of 1917 (Laws of Missouri, 1917, pp. 237-242, Secs. 9836 to 9848, Rev. Stats. of Missouri, 1919, the full text of which is printed as Appendix A to this

brief) is a franchise or privilege tax, in the nature of an excise tax. The Supreme Court of Missouri, in *State of Missouri ex rel. v. The State Tax Commission* (221 S. W. 721) specifically holds that it is not a property tax, and the court below in this case (Rec. p. 27) said "it is designated as a 'franchise tax,' but it is better described as an 'excise tax,' because this term avoids confusion with the tax properly levied upon franchises as property." (The opinion of the District Court in this case is printed as Appendix C to this brief.) Appellant admits (brief of appellant, p. 18) that "the act in its entirety clearly expresses an intention to lay a tax upon the privilege of transacting business in the State."

By Section 2 of the Act, all corporations subject to the tax are required to make an annual report in writing, verified by one of its principal officers, as the basis for the assessment of the tax. In compliance with this section, appellant, on the 1st day of February, 1919, made and filed its report as follows (omitting formal and immaterial portions, Rec. pp. 135-136):

4. Authorized capital stock.....	8450,000,000
5. Capital stock subscribed.....	57,947,026
6. Capital stock issued and outstanding.....	57,947,026
7. Capital stock paid up.....	57,947,026
8. Par value of stock.....	57,947,026
9. Surplus and undivided profits.....	None.
10. Clear market value of stock.....	8,100,742
11. Nature and kind of business.....	
.....	
12. Location of place or places of business.....	
.....	
13. Clear market value of property and assets in this state.....	122,826,652
14. Clear market value of property and assets without this State (other side for instructions) ..	206,232,896
.....	

15. Clear market value of total capital stock, surplus, property and assets.....	329,059,548
16. Par value of outstanding capital stock and surplus.....	57,947,026
17. Amount of capital stock employed within the State.....	21,625,830
18. Total amount of capital stock employed without this State....	36,321,196

From the facts stated in the report, the State Tax Commission assessed the tax of which appellant complains, according to the rule prescribed by Section 1, that is, it took the total of appellant's outstanding capital stock and the total of its property and assets wherever located, and from that it ascertained its total surplus, and then from the report it took the value of appellant's property and assets located in Missouri, and by computation found the proportion the same bore to the total value of its property and assets wherever located, and with that as the measure it determined that the amount or proportion of appellant's capital stock and surplus employed in Missouri was \$122,826,652, and assessed appellant's tax on that basis.

Mr. Williams, chairman of the State Tax Commission, testified (Rec. p. 142) that the same rule was applied in ascertaining the surplus and in the assessment of the tax of the other railroad companies reporting that was applied in ascertaining appellant's surplus and assessing the tax against it. He further testified (Rec. pp. 140-141) that the same rule was applied in ascertaining the surplus and computing the tax assessed against the Missouri-Pacific Railroad Company, of which appellant complained and upon which it bases its charge that it was discriminated against in the administration of the law, and that when the attention of the Commission was called to an alleged error in the report of the last named corporation by appellant's counsel, the Commission began an investigation to ascertain the facts to enable it to assess the proper tax against that company (Rec. p. 142).

Appellant's Exhibit 7 (found in Record between pages 71 and 75) does not disclose the values reported by the various

corporations, and does not, therefore, afford any basis for a comparison as to whether the tax assessed against appellant was on any different basis from that assessed against the other corporations named.

Appellant's Exhibit 6 (Rec. pp. 72-73) shows the amount of property returned by various corporations to the State Tax Commission as a basis for *ad valorem* or property taxation. While these reports are made to the same commission to which the reports under the Corporation Franchise Tax Act are made, the two have no relation and are the basis for the assessment of taxes of an altogether different character. The value of the property returned by appellant and other railroad companies for property or *ad valorem* taxes does not afford any basis for comparison with the report of values for the assessment of the corporation franchise tax, for the reason, that the property required to be returned under the former is not identical with the property and assets required to be reported under the latter. Under the former only property which is actually employed in the operation of the railroad is returned to the State Tax Commission, all other classes of property belonging to the railroad company being assessed locally by the various county assessors, and not reported in kind to the State Tax Commission or the State Board of Equalization (Rev. Stats. of Mo., 1909, Secs. 11554 and 11559,) while the report under the Corporation Franchise Tax Act includes all classes of property and assets. It is, therefore, evident that the property returned for property or *ad valorem* taxation, as set out in Exhibit 6, is not identical with the property and assets reported under the law in question.

A comparison of appellant's return for property taxation, as disclosed in Exhibit 6, with its report of values for the purposes of the determination and assessment of the tax in question as disclosed in Exhibit 33 (Rec. pp. 135-136) clearly indicates this difference, as it valued the property it reported for property or *ad valorem* taxes at \$54,756,083. While it reported its property and assets in the state for the purposes of the Corporation Franchise Tax at \$122,826,652 (Rec. p. 136).

In State ex rel. Marquette Hotel Investment Co. v.

State Tax Commission, 221 S. W. 721, Judge Graves, in a separate concurring opinion, held that the following words in Section 10 of the Act, "and all corporations which employ all their property and all their outstanding capital stock in this State shall all report and pay the fees on all its outstanding capital stock, whether employed in this State or not," are in conflict with Sections 1 and 2, and that the section should be read with this clause omitted. This holding of Judge Graves was adopted by the court in the opinion overruling motions for rehearing. (The opinion of the Supreme Court of Missouri in the Marquette Hotel case, the separate concurring opinion of Judge Graves, and the opinion overruling motion for rehearing are printed as Appendix B to this brief.) As thus construed, corporations which employ all their property and all their outstanding capital stock in Missouri are required to set out the value of their property in their report to the State Tax Commission, and are not relieved therefrom by Section 10 of the Act, as stated by appellant.

The Supreme Court of Missouri did not construe the Corporation Franchise Tax Act as based upon or measured by "the volume of business," and it was not so applied in assessing the tax of which appellant complains. It is said by the Court in its opinion on motion for rehearing, that "franchise taxes, to be fair, should be measured by the volume of business," and said that "the volume can best be measured by the property used in the business."

The Act of the Missouri Legislature of 1901 (Rev. Stats. of Mo., 1909, Secs. 11551 and 11552), provides for the assessment of the franchise value of property employed in the operation of railroads and other public service corporations for the purposes of *ad valorem* or property taxation. The tax is assessed and levied directly on the property according to its value. The law simply provides that in ascertaining the assessable value of the property of railroads and other corporations named, the value which accrues to the property by reason of its employment in that particular use shall be considered. Appellant is in error in saying that this tax was in addition to *ad valorem* taxes. It is an *ad valorem* tax, a part of the general property tax, and the law is a mere rule for ascertaining the assessable value of that character of property.

POINTS AND AUTHORITIES.

1.

DOUBLE TAXATION IS NOT PROHIBITED BY THE CONSTITUTION OF MISSOURI IN EXPRESS TERMS, AND IS INVALID ONLY WHEN THE UNIFORMITY SECTION (SECTION 4, ARTICLE X. CONSTITUTION OF MISSOURI), IS THEREBY VIOLATED. THE ASSESSMENT REQUIRED BY THE ACT OF 1901 IS FOR PROPERTY TAXATION, AND IS NOT A FRANCHISE, EXCISE OR PRIVILEGE TAX. DOUBLE TAXATION IN A LEGAL SENSE DOES NOT EXIST UNLESS THE DOUBLE TAX IS LAID UPON THE SAME BASIS AND UPON THE SAME PROPERTY.

Secs. 11551 and 11552, Rev. Stats. of Mo., 1909.
(Secs. 12999 and 13000, Rev. Stats. of Mo., 1919);

Sec. 21, Art. X, Missouri Constitution;
State ex rel. Marquette Hotel Investment Co. v.
State Tax Commission, 22 S. W. 721;
St. Louis-San Francisco Ry. Co. v. Middelkamp, *et al.*
(Rec. p. 26 Appendix C);
St. Louis S. W. Ry. Co. v. Arkansas, 235 U. S. 350;
Flint v. Stone Tracy Co., 220 U. S. 107, *l. e.* 161;
Ohio Tax Cases, 232 U. S. 576, *l. e.* 593;
Shaffer v. Carter, 252 U. S. 37, *l. e.* 58;
State ex rel. v. Shields, 230 Mo. 91, *l. e.* 100;
State v. Taylor, 186 Mo. 608, *l. e.* 614.

2.

THE ACT OF CONGRESS PROVIDING FOR FEDERAL CONTROL OF RAILROADS DURING THE WAR (40 STAT. L. P. 451, CHAP. 25, SECTIONS 1 AND 15) SPECIFICALLY PRESERVES UNIMPAIRED, THE POWER OF THE STATE TO ASSESS AND COLLECT TAXES, INCLUDING A TAX OF THE CHARACTER HERE IN QUESTION, DURING FEDERAL CONTROL.

Secs. 1 and 15, Chap. 25, 40 Stats. L., p. 451;
Wabash R. R. Co. v. Board of Review, 288 Ill. 159.

3.

THE CONTEXT CLEARLY DISCLOSES THE INTENTION OF THE LEGISLATURE TO IMPOSE THE TAX ON BOTH CAPITAL STOCK AND SURPLUS OF ALL CORPORATIONS SUBJECT TO THE TAX, AND THAT THE OMISSION OF THE WORDS "AND SURPLUS" BETWEEN THE WORDS "CAPITAL STOCK" AND "EMPLOYED IN THIS STATE" IN THE SECOND CLAUSE OF SECTION 1 IS A MERE CLERICAL ERROR AND INADVERTENCE WHICH THE COURTS WILL SUPPLY BY CONSTRUCTION TO GIVE EFFECT TO THE MANIFEST INTENTION OF THE LEGISLATURE.

See. 1, Franchise Tax Act, 1917; Sec. 9836, Rev. Stats. of Mo., 1919;
U. S. ex rel. Attorney-General v. Del. & H. Co., 213 U. S. 366;
Bingham v. Birmingham, 103 Mo. 345;
United States v. Goldenberg, 168 U. S. 95, l. c. 98;
United States v. Stowell, 133 U. S. 1, l. c. 12;
Penn Mutual Life Ins. Co. v. Lederer, 247 Fed. 559, l. c. 561;
Scottish Union & Nat. Ins. Co. v. Bowland, 196 U. S. 611, l. c. 629;
Johnson v. Southern Pacific, 196 U. S. 1, l. c. 17;
United States v. Lacher, 134 U. S. 624, l. c. 628;

Hartranft v. Oliver, 125 U. S. 525;
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 In re Estate of Clark, 270 Mo. 351, l. c. 362;
 State ex rel. v. Koeln, 278 Mo. 28, l. c. 37;
 American Law Reports, Vol. 3, p. 404;
 Ruling Case Law, Vol. 25, par. 216, p. 990;
 Ruling Case Law, Vol. 25, par. 222, pp. 967 and 969;
 36 Cyc. pp. 1126 and 1127;
 37 Cyc. p. 768;
 Cooley on Tax (3rd Ed.) pp. 460-465;
 Black on Interpretation of Statutes (2nd Ed.) Sec.
 145, p. 515;
 Endlich on Interpretation of Statutes, par. 346,
 p. 480;
 Lewis-Sutherland Statutory Construction (2nd Ed.)
 Vol. 2, pp. 993-994.

4.

THE ACT (SECTION 8) PROVIDES THAT IF TAXES ARE NOT PAID, SUITS SHALL BE BROUGHT TO COLLECT IN THE NAME OF THE STATE IN A COURT OF COMPETENT JURISDICTION, AND THIS IS THE ONLY MEANS BY WHICH PAYMENT MAY BE ENFORCED. THIS CLEARLY AFFORDS THE TAXPAYER SUCH OPPORTUNITY FOR A HEARING AS THE LAW REQUIRES.

Sec. 2, Franchise Tax Act, 1917; Sec. 9837, Rev. Stats. of Mo., 1919; Appendix A;
 Sec. 8, Franchise Tax Act, 1917; Sec. 9843, Rev. Stats. of Mo., 1919; Appendix A;
 Hagar v. Reclamation Dist., 111 U. S. 701, l. c. 711;
 Davidson v. New Orleans, 96 U. S. 97, l. c. 104;
 Kentucky Railroad Cases, 115 U. S. 321, l. c. 335;
 Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526, l. c. 534;
 Gallup v. Schmidt, 183 U. S. 300, l. c. 307;

Security Trust Co. v. Lexington, 203 U. S. 323, l. e. 333;
 Clement Nat'l Bank v. Vermont, 231 U. S. 120, l. e. 143;
 Wells, Fargo & Co. v. Nevada, 248 U. S. 165, l. e. 168;
 Embree v. Road Dist., 257 Mo., 593, l. e. 611-613;
 Embree v. K. C. & L. B. Road Dist., 240 U. S. 242 l. e. 251.

5.

THE SUPREME COURT OF MISSOURI HAS CONSTRUED THE LAW INVOLVED HERE, IN MARQUETTE HOTEL INVESTMENT CO. v. STATE TAX COMMISSION, 221 S. W. 721, AND DEFINED THE TERM "SURPLUS," AS USED IN THE LAW, TO MEAN THE EXCESS OF THE VALUE OF ASSETS OVER THE PAR VALUE OF CAPITAL STOCK, AND THIS COURT WILL FOLLOW THAT CONSTRUCTION.

State ex rel. Marquette Hotel Investment Co. v. State Tax Commission, 221 S. W. 721;
 Elmendorf v. Taylor, 23 U. S. 152, l. e. 160;
 Northern Pacific Railway Co. v. Meese, 239 U. S. 614; l. e. 619;
 Forsyth v. Hammond, 166 U. S. 506, l. e. 518;
 Farncomb et al. v. Denver, 40 Sup. Ct. Rep. 271;
 Wilson v. Standefer, 184 U. S. 399, l. e. 412;
 Fairfield v. Gallatin, 100 U. S. 52;
 Riding v. Johnson, 128 U. S. 224;
 Watson v. Maryland, 218 U. S. 173;
 Kentucky Union Co. v. Kentucky, 219 U. S. 140;
 Lindsley v. Mutual Carbonic Co., 220 U. S. 61;
 Michigan Central R. R. Co. v. Michigan, 236 U. S. 615;
 Price v. Illinois, 238 U. S. 446;
 Erie R. R. Co. v. Hilt, 247 U. S. 97, l. e. 100;
 Clement Nat. Bank. v. Vermont, 231 U. S. 120, l. e. 134;
 Burgess v. Seligman, 107 U. S. 20;
 Kuhn v. Fairmont Coal Co., 215 U. S. 349.

6.

THE APPELLANT WHOLLY FAILED TO SHOW, OR POINT OUT ANY DISCRIMINATION AGAINST IT AS COMPARED WITH THE TAX ASSESSED AGAINST OTHER RAILROAD COMPANIES. THE STATE TAX COMMISSION BASED ITS COMPUTATION OF APPELLANT'S TAXES SOLELY UPON THE SWORN VALUES STATED BY IT IN ITS REPORT. THE RETURN MADE FOR THE PURPOSES OF PROPERTY OR AD VALOREM TAXES ARE NOT ANY BASIS FOR COMPARISON OF VALUES FOR THE PURPOSES OF ASSESSING THE FRANCHISE OR EXCISE TAX, AS THE PROPERTY RETURNED FOR THE FORMER TAX IS NOT IDENTICAL WITH THE PROPERTY AND ASSETS REPORTED FOR THE LATTER.

Sec. 11554, Rev. Stats. of Mo., 1909;
State ex rel. v. C., R. I. & P. Ry. Co., 162 Mo. 391,
l. c. 394;
State ex rel. Tiller v. H. & St. J. Ry. Co. 89 Mo. 98,
l. c. 102;
State ex rel. Ziegenhein v. St. L.-S. F. Ry. Co., 117
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State ex rel. v. H. & St. J. R. R. Co., 135 Mo. 618;
Sunday Lake Iron Co. v. Township of Wakefield,
247 U. S. 350;
Chicago, Burlington & Quincy Ry. Co. v. Babcock,
204 U. S. 585, l. c. 597;
Coulter v. L. & N. R. R. Co., 196 U. S. 509, l. c.
608.

THE SUPREME COURT OF MISSOURI DID NOT HOLD IN THE MARQUETTE HOTEL CASE (221 S. W. 721) THAT UNDER THE MISSOURI FRANCHISE TAX LAW THE TAX IS "MEASURED BY THE VOLUME OF BUSINESS," AND THE TAX OF WHICH APPELLANT COMPLAINED WAS NOT ASSESSED ON THAT BASIS. THE LAW MEASURES THE TAX BY THE PROPORTION OF PROPERTY AND ASSETS LOCATED IN THE STATE BEARS TO TOTAL PROPERTY AND ASSETS WHEREVER LOCATED, THE SUPREME COURT OF MISSOURI SO HELD, AND THE TAX IN QUESTION WAS ASSESSED ACCORDING TO THAT RULE. IT IS THOROUGHLY ESTABLISHED THAT CAPITAL EMPLOYED IN INTERSTATE COMMERCE, ALTHOUGH NOT ITSELF DIRECTLY TAXABLE BY THE STATE MAY BE LAWFULLY INCLUDED IN MEASURING A PRIVILEGE OR EXCISE TAX.

State ex rel. Marquette Hotel Investment Co. v.
State Tax Commission, 221 S. W. 721;
Western Union Telegraph Co. v. Massachusetts,
125 U. S. 530;
U. S. Glue Co. v. Oak Creek, 247 U. S. 321, l. c. 327;
Armour & Co. v. Virginia, 246 U. S. 1, l. c. 7;
K. C. etc. R. R. Co. v. Stiles, 242 U. S. 111, l. c. 119;
K. C. etc. Ry. Co. v. Kansas, 240 U. S. 227, l. c. 232;
Underwood Typewriter Co. v. Chamberlain, 40
Sup. Ct., p. 45;
Baltic Mining Co. v. Massachusetts, 231 U. S. l. c.
82-83;
Flint v. Stone Tracy Co., 220 U. S. 107, l. c. 165;
United States Express Co. v. Minnesota, 223 U. S.
335, l. c. 344;
St. Louis S. W. Ry. Co. v. Arkansas, 235, U. S. 350.

BRIEF OF THE ARGUMENT.**I.**

DOUBLE TAXATION IS NOT PROHIBITED BY THE CONSTITUTION OF MISSOURI IN EXPRESS TERMS, AND IS INVALID ONLY WHEN THE UNIFORMITY SECTION (SECTION 4, ARTICLE X, CONSTITUTION OF MISSOURI) IS THEREBY VIOLATED. THE ASSESSMENT REQUIRED BY THE ACT OF 1901 IS FOR PROPERTY TAXATION, AND IS NOT A FRANCHISE, EXCISE OR PRIVILEGE TAX. DOUBLE TAXATION IN A LEGAL SENSE DOES NOT EXIST UNLESS THE DOUBLE TAX IS LAID ON THE SAME BASIS UPON THE SAME PROPERTY.

The Act of the Missouri Legislature of 1901 (Laws of Missouri, 1901, page 232; Rev. Stats. of Mo., 1909, Secs. 11551 and 11552) does not provide for a franchise, excise or privilege tax in any sense. It reads as follows:

"Sec. 11551. To be assessed, how—tax due and payable, when.—The franchises (other than the right to be a corporation) of all railroad, street railroad, bridge, telegraph, telephone, conduit, water, electric light and gas companies, and of all other similar corporations owning, operating and managing public utilities, and of all quasi public corporations possessing special and peculiar privileges and authorized by law to perform any public service (except corporations formed for religious, educational and benevolent purposes) shall be assessed for the purposes of taxation at the same time and in the same manner as other property of such corporation is now or may hereafter be required to be assessed; and there shall be levied upon the assessed value of such franchise the same rate of taxation as may be levied upon other property of such corporation. Said tax shall

be due and payable, and like proceedings may be had to collect the same, and when collected it shall be disposed of in the same way as the taxes imposed upon the other property of such corporation.

"Sec. 11552. Valuations, how fixed and by whom.—The State board of equalization in cases of railroads, street railroads, bridges, telegraph, telephone companies and other corporations whose property the state board of equalization is now or may hereafter be required to assess, and the county assessor, in case of the other quasi public corporations referred to in the preceding section, shall ascertain, fix and determine the total value for taxable purposes of the entire property of such corporation, tangible and intangible, in this state, and shall then assess the tangible property and deduct the amount of such assessment from the total valuation and enter the remainder upon the assessment list or in the assessor's books, under the head of 'all other property'."

A casual reading of the statute will clearly disclose that the taxes dealt with are property or *ad valorem* taxes. The act is no more than a rule for the ascertainment and assessment of the value of the property of railroad and other public service corporations for the purpose of property taxation. The State board of equalization and other assessing officers are required to ascertain, fix and determine the total value, for taxable purposes, of the entire property of the corporations named, both tangible and intangible, and are then directed to assess the value of the tangible property and deduct the same from the total valuation and enter the remainder, that is, the intangible, or so-called franchise, value under the head of "all other property." It is quite evident that the purpose of the act is to require the inclusion for the purposes of property taxation of that element of value which attaches to the bare physical property by reason of its use in the particular business in which it is employed. Under the Missouri statutes quoted by appellant it is assessed as a part of the value of the property and is taxed at the same rate. There is no basis for the conten-

tion that the tax levied following the assessment is a franchise tax in the sense of an excise or privilege tax.

The tax involved here is clearly an excise or privilege tax.
State ex rel. Marquette Hotel Investment Co. v. State Tax Commission, 221 S. W. 721;
St. Louis-San Francisco Ry. Co. v. Middelkamp, etc., et al. (Rec. p. 26); Appendix C.
St. Louis S. W. Ry. Co. v. Arkansas, 235 U. S. 350;
Flint v. Stone Tracy Co., 220 U. S. 107, L. c. 161.

In the last cited case this Court has pointed out (p. 161) the privileges upon which this character of tax is levied, as follows:

"The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals."

Appellant's contention as to double taxation has been disposed of by this Court in the *Ohio Tax Cases*, 232 U. S.

576, I. e. 593, a case clearly in point, and in *Sheafer v. Carter*, 252 U. S. 37, I. e. 58.

The same contention was made in *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, under the identical situation existing here. In overruling the contention the court said (pages 366-368):

"The gist of the criticism seems to be that the two acts in question subject the property of the plaintiff in error, as well as that of all other corporations that are within the operation of those acts, to double taxation, and that this is a denial of 'equal protection' in favor of other classes of tax payers. Reference is made to an extract from the opinion in the *Adams Case* (155 U. S. 696) where the court said: 'Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. *Cleveland etc. Ry. v. Backus*, 154 U. S. 439, 445.' This, however, does not mean, as is contended, that because of the fourteenth amendment a state may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the state, including that employed in interstate commerce. The court was dealing only with the Commerce Clause, and the language quoted means that, by whatever name the tax or taxes may be called that are fixed by reference

to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack: and that it is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use. This is evident from a reading of the context and from the reference made to the opinion in 151 U. S. at p. 445.

Nothing in the Fourteenth Amendment imposes any iron-clad rule upon the States with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions. *Davidson v. New Orleans*, 90 U. S. 97, 105, 106; *Bell's Gap R. R. v. Pennsylvania*, 134 U. S. 232, 237; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 351; *Adams Express Co. v. Ohio*, 165 U. S. 194, 228; *Merchant's Bank v. Pennsylvania*, 167 U. S. 461, 464; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 295; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 235; *Michigan Central R. R. v. Powers*, 201 U. S. 245, 293."

Furthermore, if the assessment and taxation of appellant under the provisions of the Missouri Act of 1901 should be held to be the same character of tax as that imposed by the statute in question here so that the imposition of both would amount to unlawful double taxation, and destroy one or the other, the Act of 1901 would be repealed by implication.

State ex rel. v. Shields, 230 Mo. 91, l. c. 100;
State v. Taylor, 186 Mo. 608, l. c. 614.

Under these circumstances appellant should have resisted the application of the Act of 1901 in the assessment of its property for *ad valorem* taxes.

Appellant asserts, but does not support its assertion with either authority or argument, that the payment of the fee required by the Constitution of Missouri (Sec. 21, Art. X) to be paid by "*the persons named as corporators*" at the time of filing the articles of association or incorporation in some manner precludes or restricts the state in the imposition of taxes upon the privileges which inure to the corporation, notwithstanding the section itself contains a provision "that nothing contained in this section shall be construed to prohibit the General Assembly from levying a further tax on the franchise of such corporation." Clearly this was inserted in the Constitution to avoid the very contention which appellant here makes, but in the absence of a saving provision, no sort of reasoning can be found to support the theory that the exaction of a fee of the incorporators of a corporation, a mere charge for the granting of the charter, can impair or restrict the sovereign power of the state in imposing an annual excise or privilege tax on the corporation, especially in view of the definition, or pointing out, of the "thing taxed" in taxation of this character in the *Flint v. Stone Tracy Company* case, *supra*.

2.

THE ACT OF CONGRESS PROVIDING FOR FEDERAL CONTROL OF RAILROADS DURING THE WAR (40 STAT. L. p. 451, CHAP. 25, SECS. 1 AND 15) SPECIFICALLY PRESERVES UNIMPAIRED THE POWER OF THE STATE TO ASSESS AND COLLECT TAXES, INCLUDING A TAX OF THE CHARACTER HERE IN QUESTION, DURING FEDERAL CONTROL.

Section 15 of the Federal Control Act (40 Stat. L. Chap. 25, p. 451) provides:

"Sec. 15. That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the state in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers,

or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

Under the third clause of Section 1 of the Federal Control Act, *supra*, it is provided that every agreement between the Government and a railroad shall provide that taxes (other than the Federal taxes mentioned in the first clause) "assessed under Federal or any other governmental authority * * * either on the property used under such Federal Control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation * * * * shall be paid out of revenues derived from railway operations while under Federal Control."

It is evident that Congress intended to preserve the taxing powers of the states against railroad companies and railroad property, notwithstanding Federal Control and during the time they would be under Federal Control. The language of Section 15 is broad enough to include, and evidently was intended to include, every form of tax the state was then levying against railroad companies and other property, including a tax of the character in question here, and the provisions of Section 1 above quoted clearly include taxes of this character.

The Supreme Court of Illinois, in *Wabash R. R. v. Board of Review*, 288 Ill. 159, has so held, but authority is hardly necessary to support such a clear proposition.

3.

THE CONTEXT CLEARLY DISCLOSES THE INTENTION OF THE LEGISLATURE TO IMPOSE THE TAX ON BOTH CAPITAL STOCK AND SURPLUS OF ALL CORPORATIONS SUBJECT TO THE TAX, AND THAT THE OMISSION OF THE WORDS "AND SURPLUS" BETWEEN THE WORDS "CAPITAL STOCK" AND "EMPLOYED IN THIS STATE" IN THE SECOND CLAUSE OF SECTION 1 IS A MERE CLERICAL ERROR AND INADVERTENCE, WHICH THE COURTS WILL SUPPLY BY CONSTRUCTION, TO GIVE EFFECT TO THE MANIFEST INTENTION OF THE LEGISLATURE.

A reading of Section 1 and of the entire act discloses the purpose of the Legislature to have been to impose a tax of three-fortieths of one per cent of the par value of the outstanding capital stock and surplus of all corporations, including those which employ a part of their capital stock and surplus in business in another state or country. The third clause of Section 1, which immediately follows the clause which is under criticism, clearly indicates the intention of the Legislature and demonstrates beyond question that the omission of the words "and surplus" from the second clause is a mere clerical mistake. If it had been the intention of the Legislature to measure the tax on corporations which employ a part of their capital stock in other states by the proportion of their capital stock only, then the third clause is meaningless, and its insertion absurd, because it refers only, and can refer only, to the second clause. Either the third clause must be discarded or the words "and surplus" must be in effect supplied in the second clause.

The amazing consequences of such an interpretation as plaintiff insists upon and the obvious injustice and patent unconstitutionality of the discrimination involved in that interpretation are apparent upon the most superficial examination. That the Legislature intended that a Missouri corporation, whose business is confined to this State, should be discriminated against in favor of another Missouri corporation, which might be of exactly the same character, simply because

the second corporation does some business outside the State, and that it should be so grossly discriminated against as this interpretation would necessitate, is simply an absurdity and the flimsy explanations offered by the plaintiff for the discrimination (that the Legislature desired to encourage domestic corporations to spread out, etc.) indicates that plaintiff's able counsel are fully conscious of such absurdity. It would be a plain violation, moreover, of Section 3, Article X, of the Constitution of Missouri prohibiting tax discrimination between members of the same class. Certainly there is no equitable basis for a classification of Missouri corporations for the purposes of this act into those doing business wholly in Missouri and those doing business in Missouri and also in other states. And, of course, the rule is that neither an absurd construction nor a construction which would make the statute unconstitutional will be adopted where a construction that is not absurd, but is just and reasonable, and not inconsistent with the fundamental law, may possibly be adopted.

U. S. ex rel. Attorney-General v. Del. & H. Co., 213 U. S. 366;
Bingham v. Birmingham, 133 Mo. 345.

To supply the words so plainly omitted by inadvertence is a wholly proper exercise of judicial power. None of the cases cited to the effect that courts may not infringe upon the exclusive power of the law-making branch of the state government to legislate are applicable to the situation here. This is no *casus omissus*. No judicial legislation is required. All that is needed is to resort to the well settled rule that where it appears from the context that certain words have been omitted inadvertently from a statute the court may supply such words as are necessary to complete the sense and to express the legislative intent and purpose.

The primary rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature.

The rule is well stated in Ruling Case Law (25 R. C. L., par. 216, p. 990), supported by a long line of authorities, as follows:

"While courts can not add to, take from or change the language of a statute to give effect to any supposed intention of the Legislature, words and phrases may be altered and supplied when that is necessary to obviate repugnancy and inconsistency and to give effect to the manifest intention of the Legislature."

And in giving effect to the manifest intention of the Legislature as disclosed by the context, the courts will supply words and phrases which have been omitted through inadvertence or clerical error. The rule is stated in *Cyclopedia of Law and Procedure* (36 Cye., 1127) as follows:

"When it appears from the context that certain words have been inadvertently omitted from a statute, the courts may supply such words as are necessary to complete the sense and to express the legislative intent."

And in *American Law Reports* (A. L. R., Vol. 3, p. 401) the principle is stated:

"Where words have been omitted from a statute or an ordinance by inadvertence or through a clerical error, and the intent of the legislature is ascertainable from the context, the court will insert the words necessary to carry out that intent. Courts will not permit an act to be declared invalid for uncertainty where reason demands an insertion of words therein."

And again in *Ruling Case Law* (25 R. C. L., par. 222, pp. 967 and 969):

"When the intention of a statute is plainly discernible from its provisions that intention is as obligatory as the letter of the statute, and will often prevail over the strict letter.

"It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter."

The authorities are divided as to whether revenue laws and laws imposing taxes are to be liberally or strictly construed, as are penal statutes, *but all the authorities agree that in the construction of laws imposing taxes, as in all other laws, effect must be given to the manifest purpose and intention of the Legislature.* The rule is that tax laws will not be extended by inference, implication or analogy to persons or subjects not mentioned in the law, but in ascertaining and giving effect to the intention and purpose of the Legislature the same rule prevails in the construction and application of tax laws that applies in the construction of all other statutes.

37 Cyc. 768;

Cooley on Tax (3rd Ed.) pp. 460-465;

Black on Interpretation of Statutes (2nd Ed.) Sec.

145, p. 515;

Endlich on Interpretation of Statutes, par. 346, p.

480;

Lewis-Sutherland Statutory Construction (2nd Ed.)

Vol. 2, pp. 993-994;

United States v. Goldenberg, 168 U. S. 95, l. c. 98;

United States v. Stowell, 133 U. S. 1, l. c. 12;

Penn Mutual Life Ins. Co. v. Lederer, 217 Fed. 559,

l. c. 561;

Scottish Union & Nat. Ins. Co. v. Bowland, 196

U. S. 611, l. c. 629;

Johnson v. Southern Pacific, 196 U. S. 1, l. c. 17;

United States v. Lacher, 134 U. S. 624; l. c. 628;

Hartranft v. Oliver, 125 U. S. 525;

United States v. Thompson, 189 Fed. 838, l. c. 841;

U. S. v. Raisch, 144 Fed. 486;

Travis v American Cities Co., 182 N. Y. S. 394.

The spirit of the rule is well stated in *Penn Mutual Life Ins. Co. v. Lederer, supra*, as follows:

"We have been reminded by counsel for the plaintiff that the accepted rule is, as the doctrine is sometimes phrased, 'that taxing statutes are to be strictly construed.' Care must be exercised in the use of this phrase, as of all other general expressions, so as not to permit the true doctrine to be misunderstood. It does not mean, as it is sometimes thoughtlessly assumed to mean, that courts, in construing such statutes, should lean strongly toward the taxpayer and add the weight of all their power and authority to a resistance to the collection of the tax. The doctrine is more fundamental, and has a historical basis to be found in the political history of our people. It is the American doctrine that the people govern themselves, and a vital part of that principle is that they, and they only, tax themselves. No tax can in consequence be imposed except by their representatives in Congress, and a further negative consequence is that no tax can be imposed by the courts or the executive, through judicial or administrative construction of statutes. This is the sense in which tax laws are to be strictly construed. When, however, Congress has indicated its purpose and intent to tax, the tax must be paid, and the courts can not refuse to enforce that purpose and intent merely because, in the expression of its will, Congress has failed to dot or to cross some of the letters which make up the written words in which that mandate is recorded. In this sense laws for the raising of revenue are not to be strictly construed, but are to be given that construction which is given to remedial statutes. In other words, the doctrine is a broad and not a pica-yune one."

The same rule of construction applies in Missouri.

In re Estate of Clark, 270 Mo. 351, l. c. 362;
State ex rel. v. Koeln, 278 Mo. 28, l. c. 37.

In the last cited case the Supreme Court states and applies the rule as follows:

"When the entire act is read and considered in the light of the entire scheme of revenue assessment and collection we are satisfied that it was the intention of the General Assembly that such receipts should be exhibited to the collector whose duty it is to collect the income tax and that the word 'assessor' in Section 32 of the act is the result of a clerical error and should be construed to read 'collector,' in harmony with the true legislative intent.

"The correct rule here applicable is stated in 36 Cyc., 1126, as follows:

"Mere verbal inaccuracies, or clerical errors in statutes in the use of words, or numbers, or in grammar, spelling, or punctuation, will be corrected by the court whenever necessary to carry out the intention of the Legislature as gathered from the entire act."

The authorities cited by plaintiff are not in conflict with this statement of the law, and many of them recognize and expressly approve it, notably U. S. v. Goldenberg, 168 U. S. 98, and Travis v. American Cities Co., 182 N. Y. S. 394.

4.

THE ACT (SECTION 8) PROVIDES THAT IF TAXES ARE NOT PAID, SUITS SHALL BE BROUGHT TO COLLECT IN THE NAME OF THE STATE IN A COURT OF COMPETENT JURISDICTION, AND THIS IS THE ONLY MEANS BY WHICH PAYMENT MAY BE ENFORCED. THIS CLEARLY AFFORDS THE TAXPAYER SUCH OPPORTUNITY FOR A HEARING AS THE LAW REQUIRES.

Section 2 of the Act requires corporations to make a report in writing to the State Tax Commission on or before the 1st day of February in each year, stating the amount of their capital stock issued and outstanding, the amount of capital

stock paid up, the par value of the stock, its clear market value, the amount of surplus and undivided profits, the character of business in which it is engaged, the clear market value of its property and assets in the State, the clear market value of its property and assets without the State, and the clear market value of its total capital stock, surplus, property and assets. Section 3 directs the tax commission to assess the tax and report the same to the State auditor, who is required to make out a tax bill therefor against each corporation and deliver the same to the state treasurer. The only method of enforcing payment of the tax is provided in Section 8, which is as follows:

"If any corporation fails or refuses to pay the taxes assessed against it under the provisions of this act on or before the first day of May, the state treasurer shall certify a list of such corporations so delinquent to the attorney-general, who shall proceed forthwith to collect the same, together with a penalty of twenty-five per cent and interest at the rate of one per cent per month. Suits for the collection of such taxes may be brought in the name of the state in any court of competent jurisdiction and any judgment rendered therein in favor of the state shall be a first lien on all the property and assets of the corporation within this state."

In determining whether in the assessment of a tax the due process clause of the Constitution has been violated by failure to give the taxpayer notice, it has been very generally held that if the payment may be summarily enforced by administrative officers, provision must be made for notice to the taxpayer and opportunity afforded him to have a hearing at the time, or before, the assessment is made and the amount fixed, but that where the tax can only be enforced by suit and final judgment in an ordinary court of justice, the requirement as to notice and hearing are fully met.

The law is thus stated in *Hagar v. Reclamation District, 111 U. S. 701, l. c. 711*:

"The assessment under consideration could, by the law of California, be enforced only by legal pro-

ceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation, assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits and, of course, to their validity it is essential that notice be given to the taxpayer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. *Reclamation District No. 108 v. Evans*, 61 Cal., 101. If property, taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller, in the *New Orleans Case*, these words, as used in the Constitution, can have no definite meaning."

The following cases are to the same effect:

Davidson v. New Orleans, 96 U. S. 97, l. c. 101;
 Kentucky Railroad Cases, 115 U. S. 321, l. c. 335;
Winona & St. Peter Land Co. v. Minnesota, 159
 U. S. 526, l. c. 534;
Gallup v. Schmidt, 183, U. S. 300, l. c. 307;
Security Trust Co. v. Lexington, 203 U. S. 323, l. c.
 333;
Clement Nat. Bank v. Vermont, 231 U. S. 120, l. c.
 143;
Wells, Fargo & Co. v. Nevada, 248, U. S. 165, l. c.
 168.

The same rule prevails in Missouri as is evidenced by the following from the opinion of the Supreme Court of Missouri in *Embree v. Road Dist.*, 257 Mo. 593, l. c. 611-613:

"This contention (that the statute violated section 21 and section 30 of article II of the Constitution of Missouri under section 1 of the Four-

teenth Amendment of the Constitution of the United States by failing to provide for notice and a hearing) is untenable for the reason that *this court and the Supreme Court of the United States have repeatedly held that where these special benefits are levied, and no provision is made for the property-owners to be heard during the proceedings imposing the special benefits, and where they are only collectible by suit, as in the case of bar, then all legal defenses the property-owners may have, from the inception of the proceedings down to the rendition of the judgment of the court on the tax bills, may be pleaded and contested in the same manner that any legal or equitable defense may be made in any other action at law or in equity.*

"The only procedure prescribed by said article 7 for the collection of these benefits is section 10620, previously mentioned, which only authorizes their collection by suit in the circuit court.

"In treating this question, Page and Jones on Taxation by Assessment, section 119, uses this language: 'The general rule is that at some time before the assessment becomes an absolute finality there must be a notice to the property-owner and an opportunity for a hearing as to those questions of fact which concern the amount of the assessment to be imposed upon such property, except such as the legislative power has authority to determine without special inquiry, and has in fact so determined. If such notice is not given and under the law the assessment becomes a finality, subject to be enforced summarily, without giving any opportunity for a hearing as to the questions of fact which concern the amount of the assessment other than those which the legislative power has authority to determine without special inquiry, and which the legislative power has in fact so determined, such assessment then constitutes a taking without due process of law and is invalid as in violation of the constitutional provisions under consideration.'

"In section 132, the same authority says: 'If the assessment is to be enforced summarily without notice or judicial proceedings, it is evident that no opportunity is thereby given to the property-owner to contest the assignment on its merits. . . . If notice has not been given at a prior stage of the proceedings so that the property-owner has an opportunity to contest the assessment upon its merits, the proceeding is in violation of the constitutional provision which forbids the taking of property without due process of law.' (Pash v. City of St. Joseph, *ante*, p. 332.)

"In section 773, the same authority says: '*If the assessment can be enforced only by an action at law or a suit in equity, and in such proceeding the property-owner is given a full opportunity to be heard upon the question of benefits, the property-owner is not entitled, as of constitutional right in the absence of statutory provision therefor, to any notice, except that of the institution of such proceedings to enforce the assessment.*'

"In *Hagar v. Reclamation Dist.*, 111 U. S. 701, it is held that: 'A law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the Fourteenth Amendment of the Constitution, which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it, either before that amount is determined or in a subsequent proceeding for its collection.'

"The same ruling has been announced by this court in the following cases: *City of St. Louis v. Richeson*, 76 Mo. 470; *Kansas City v. Huling*, 87 Mo. 203; *Saxton National Bank v. Carswell*, 126 Mo. 436; *Springfield to use v. Weaver*, 137 Mo. 650, l. c. 672."

In affirming the judgment of the Supreme Court of Missouri, this Court said (*Embree v. K. C. & L. B. Road Dist.*, 240 U. S. 242, l. c. 251):

"The claim that the land owners are not offered an opportunity to be heard in respect to the value of their lands is also untenable. While no hearing is given when the lands are appraised *one is accorded when the tax is sought to be enforced, the mode of enforcement is by a suit in a court of justice when as the Supreme Court of the State (Missouri) holds owners aggrieved by the valuation may have a full hearing upon that question. This is due process.*"

5.

THE SUPREME COURT OF MISSOURI HAS CONSTRUED THE LAW INVOLVED HERE, IN MARQUETTE HOTEL INVESTMENT CO. V. STATE TAX COMMISSION, 221 S. W. 721, AND DEFINED THE TERM "SURPLUS," AS USED IN THE LAW, TO MEAN THE EXCESS OF THE VALUE OF ASSETS OVER THE PAR VALUE OF CAPITAL STOCK, AND THIS COURT WILL FOLLOW THAT CONSTRUCTION.

The contention of appellant as to the construction of the law, and especially as to the meaning of the term "surplus," as used therein, was presented to the Supreme Court of Missouri in the case of Marquette Hotel Investment Co. v. State Tax Commission, its opinion therein being reported in 221 Southwestern Reporter, at pp. 721-728 (the various opinions of the Supreme Court of Missouri are printed as Appendix B to this brief).

The Supreme Court held that the term "surplus," as used in the law, means the excess of assets employed in the business over the par value of outstanding capital stock, as will appear from the following language found in its opinion:

"The whole controversy hinges upon the interpretation to be placed upon the word "surplus," as used in the statute. "Surplus" ex vi termini, implies an excess. Relator's contention is that, as used in this act, surplus means the excess of assets over liabilities other than stock liability. Respondent, on the other hand, contends that the surplus

is the excess of the gross assets over the total outstanding capital stock, and that the amount of relator's indebtedness is an irrelevant circumstance.

* * * * *

"If relator's theory is correct, and all liabilities must first be deducted in order to ascertain what the surplus is, or whether or not there is any surplus, it would be an easy matter for a corporation practically to escape the tax levied by this law, and nevertheless to enjoy all the benefits of a franchise to do business in this state with assets circumscribed only by the limits of its ability to borrow money or to contract debts. It cannot be supposed that the Legislature intended such a condition to exist. Neither can it be supposed that a possibility so obvious escaped the legislative attention. It necessarily follows that, in view of the language of sections 1 and 2, and of the whole purpose of this act, as disclosed by the act itself, the legislature must have intended the word "surplus" to mean the difference between the amount of the outstanding capital stock of a wholly domestic corporation, such as relator is, and the amount of the assets of that corporation, excluding liabilities of all sorts. Were the rule otherwise, this peculiar condition might exist: A corporation might accumulate a surplus of \$100,000, which it could either use in its business or distribute in dividends to its stockholders. If it used this sum in its business, its franchise tax would then be based upon the amount of its outstanding capital stock, plus \$100,000. But if it distributed this same \$100,000 as dividends to its stockholders and immediately borrowed it back from them and employed it in its business, the franchise tax, upon relator's theory, would be based upon the outstanding capital stock alone. In other words, the amount of the franchise tax would depend on the method of bookkeeping employed. A statute is not to be so construed as to produce an absurdity.

* * * * *

" * * * Clearly in this case the General As-

sembly meant by "surplus" the excess of assets employed in the business over the par value of outstanding capital stock, without regard to liabilities."

That the Supreme Court of the United States will follow the decision of the highest court of a state as to the meaning of the laws of that state is so well recognized that citations of authority in support of it is hardly necessary.

In *Elmendorf v. Taylor*, 23 U. S. 152, l. c. 160, Chief Justice Marshall stated the reason for the rule as follows:

"We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this Court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the Courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

In *Northern Pacific Railway Co. v. Meese*, 239 U. S. 614, l. c. 619, this Court said:

"It is settled doctrine that Federal courts must accept a construction of a state statute deliberately adopted by its highest court."

The question arising in *Forsyth v. Hammond*, 166 U. S. 506, this Court said (l. c. 518):

"The construction by the courts of a state of its Constitution and Statutes is, as a general rule, binding on the Federal courts. We may think that the Supreme Court of a state has misconstrued its

Constitution or its Statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

The doctrine has been expressly reaffirmed by this Court in *Farncomb et al. v. Denver* (decided March 1, 1920, Supt. Ct. Rep., Vol. 40, No. 11 [Advance Sheets, April 15, 1920].)

It is said in *Wilson v. Standefer*, 184 U. S. 399, L. c. 412, that the sole exception to the rule that the interpretation put on a state constitution or laws by the supreme court of such state is binding upon this Court, is in cases where the question involved is the impairment by legislation of contract rights.

Other cases which support the doctrine, and the line is unbroken, are:

Fairfield v. Gallatin Co., 100 U. S. 52;
Riding v. Johnson, 128 U. S. 221;
Watson v. Maryland, 218 U. S. 173;
Kentucky Union Co. v. Kentucky, 219 U. S. 140;
Lindsley v. Mutual Carbonic Co., 220 U. S. 61;
Michigan Central R. Co. v. Michigan, 236 U. S. 615;
Price v. Illinois, 238 U. S. 446;
Erie R. R. Co. v. Hilt, 217 U. S. 97, L. c. 100;
Clement Nat. Bank v. Vermont, 231 U. S. 120, L. c. 134.

None of the cases cited by appellant are in conflict with the foregoing, and none even remotely sustain its contention. In neither *Burgess v. Seligman*, 107 U. S. 20, or *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, was the court dealing directly with the construction, that is, the meaning of the words, of a state statute, but were determining the contract rights of private litigants, which were affected by, or to some extent depended upon, the construction the highest court of the state had, or had not, given to a statute of that state. The cases are not in point here.

It is said in the *Kuhn* case, *supra*, that even in the class of cases in which the Federal courts exercise an independent judgment in the construction of state laws "for the sake of

comity and to avoid confusion, the Federal courts should always lean to an agreement with the state court if the question is balanced with doubt," and in *Burgess v. Seligman*, *supra*, it is said that "acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the state courts."

The decision of the Supreme Court of Missouri in the Marquette Hotel case (221 S. W. 721), was announced on April 9, 1920, before this case was submitted below, and became final upon the overruling of motions for rehearing on April 18, 1920. This opinion was published in current law reports long before the District Court decided this case, June 30, 1920.

In the application of the rule according to which the Federal courts, as a matter of comity, follow the court of last resort of the state on the construction of state statutes as to their meaning, it is wholly immaterial whether the decision of the Supreme Court of Missouri had been made final before the case was submitted or decided below.

6.

THE APPELLANT WHOLLY FAILED TO SHOW, OR POINT OUT ANY DISCRIMINATION AGAINST IT AS COMPARED WITH THE TAX ASSESSED AGAINST OTHER RAILROAD COMPANIES. THE STATE TAX COMMISSION BASED ITS COMPUTATION OF APPELLANT'S TAXES SOLELY UPON THE SWORN VALUES STATED BY IT IN ITS REPORT. THE RETURN MADE FOR THE PURPOSES OF PROPERTY OR *AD VALOREM* TAXES ARE NOT ANY BASIS FOR COMPARISON OF VALUES FOR THE PURPOSES OF ASSESSING THE FRANCHISE OR EXCISE TAX, AS THE PROPERTY RETURNED FOR THE FORMER TAX IS NOT IDENTICAL WITH THE PROPERTY AND ASSETS REPORTED FOR THE LATTER.

The appellant and other railroad companies made returns to the State Tax Commission of the description and value of their property in the State used in the operation of their roads as the basis for the assessment of their property or *ad valorem* taxes. This includes only the property described in Section 11554, Revised Statutes of Missouri, 1909.

They also made report to the same commission of the value and location of their property and assets for the assessment of the annual corporation franchise or excise tax. The two reports were made at different times and are entirely separate and distinct and the taxes are of an entirely different character. The appellant returned the value of its property for *ad valorem* or property tax at \$54,756,083 (which included, of course, only the property described in Section 11554 aforesaid), but for the purposes of the assessment of the tax in question it reported the value of its property and assets in the State at \$122,876,052. It now appears to contend that the Tax Commission in assessing its franchise or excise tax should have refused to accept the sworn statement of one of its principal officers as to the value of its property and assets, and by comparison of its return for another and different tax with the return of other railroad companies for the

other and different tax, have found that the value of its property and assets in Missouri was many million dollars less than its report showed it to be. The amount of the tax was computed from the values stated by appellant in its report, and under the most fundamental and universally recognized rules it is bound by its own statement and admission, and is now estopped to assert that the Commission discriminated against it by relying on its own report and statements.

The property of appellant returned to the State Tax Commission and assessed for property or *ad valorem* taxes is not identical with the property and assets required to be reported for the assessment of the franchise or excise tax. The property assessed for *ad valorem* taxes by the State Tax Commission is only the property used in connection with the operation of the railroad, other property being assessed locally by the various county assessors.

The property returned to the State Board of Equalization is described in Section 11554, Revised Statutes of Missouri, 1909, and is as follows:

"On or before the first day of January in each and every year, the president or other chief officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state auditor a statement, duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or side tracks, with depots, water tanks and turntables, the length of such road, double or side tracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and

freight cars, and all other movable property owned, used or leased by them on the first day of June in each year, and the actual cash value thereof."

The Supreme Court of Missouri has clearly indicated the class of property of a railroad company which is assessable by the State Board of Equalization in *State ex rel. v. C., R. I. & P. Ry. Co.*, 162 Mo. 391, l. c. 394, where it is said:

"The theory of the system of taxing railroads, as contained in our statute, seems to be that the railroad with all the necessary appurtenances to its efficient equipment as a means of traffic, is to be taken as a whole and assessed for taxation by the State Board of Equalization. That does not, however, include property that is used by a railroad corporation as a collateral facility to its business, such as workshops, etc., nor property held for purposes other than those of a carrier, all of which is subject to taxation by the local authorities."

In *State ex rel. Tiller v. H. & St. J. Ry. Co.*, 89 Mo. 98, l. c. 102, it is said that Section 6901, Rev. Stats. of Mo., 1879 (now Sec. 11554, Rev. Stats. of Mo., 1909), "embraces the road bed, all real property connected with it, necessary to the operation of the road, and all movable property of the company."

The above cases, together with *State ex rel. Ziegenhein v. St. L. S. F. Ry. Co.*, 117 Mo. 1; *State ex rel. v. H. & St. J. R. R. Co.*, 135 Mo. 618, and other cases construing the statutes of Missouri with reference to taxation of railroad property, clearly establishes that many classes of property which constitute "property and assets" of railroad companies are assessed by local county assessors and are not returned to the State Tax Commission for assessment by that body as a part of the distributable property of the railroad assessable as a unit.

At the hearing below the only alleged discrimination the appellant complained of was the amount of the tax assessed against the Missouri Pacific Railroad Company, and it de-

veloped from the oral examination of Chairman Williams (Rec. p. 141) that appellant's counsel had called the attention of the Commission to the tax of that company and complained that it had not reported the full value of its property and assets in the State, whereupon the Commission began an investigation to ascertain the facts, which investigation was in progress when the case was heard below (Rec. pp. 141 and 142). These are all the facts in the record to support appellant's charge of discrimination in the administration of the law, and we submit that it falls far short of affording appellant any grounds for equitable relief under the well established rules laid down by this court.

In *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350, this Court has clearly pointed out that while "intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property," yet, "it is also clear that mere errors of judgment by officials will not support a claim of discrimination." The Court further said that "there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party."

There is no suggestion anywhere in the record of any intentional discrimination against appellant by the State Tax Commission in computing or assessing its tax, but, on the contrary, the evidence shows that when appellant's counsel called the attention of the Commission to what appellant claimed was a discrimination against it in the assessment of the tax against the Missouri Pacific Railroad Company, the Commission immediately began an investigation to ascertain whether the charge of appellant's counsel was true, and, as was said by Chairman Williams, to ascertain the facts to the end that a proper tax might be assessed. Clearly, if the tax assessed against the Missouri Pacific Railroad Company was less in proportion than that assessed against appellant, it was the result of an erroneous report by the latter company, to which the attention of the Commission had not been

theretofore called, and which it took immediate steps to correct.

The Court was of the opinion, in the Sunday Lake Iron Company case, *supra*, that the valuation of plaintiff in error's mines in that case was relatively higher than other lands, but it was "unable to conclude that the evidence suffices clearly to establish that the state board entertained or is chargeable with any purpose or design to discriminate. Its action is not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal."

Many cases clearly support the rule followed in the Sunday Lake Iron Company case, *supra*, among them Chicago, Burlington & Quincy Ry. Co. v. Babcock, 234 U. S. 585, l. c. 597; Coulter v. L. N. R. R. Co., 196 U. S. 509, l. c. 608.

7.

THE SUPREME COURT OF MISSOURI DID NOT HOLD IN THE MARQUETTE HOTEL CASE (221 S. W. 721) THAT UNDER THE MISSOURI FRANCHISE TAX LAW THE TAX IS "MEASURED BY THE VOLUME OF BUSINESS," AND THE TAX OF WHICH APPELLANT COMPLAINS WAS NOT ASSESSED ON THAT BASIS. THE LAW MEASURES THE TAX BY THE PROPORTION PROPERTY AND ASSETS LOCATED IN THE STATE BEARS TO TOTAL PROPERTY AND ASSETS WHEREVER LOCATED. THE SUPREME COURT OF MISSOURI SO HELD, AND THE TAX IN QUESTION WAS ASSESSED ACCORDING TO THAT RULE. IT IS THOROUGHLY ESTABLISHED THAT CAPITAL EMPLOYED IN INTERSTATE COMMERCE, ALTHOUGH NOT ITSELF DIRECTLY TAXABLE BY THE STATE, MAY BE LAWFULLY INCLUDED IN MEASURING A PRIVILEGE OR EXCISE TAX.

a.

The tax imposed under the Missouri Act of 1917, is a franchise, excise or privilege tax, and is, therefore, not a property tax. The Missouri Supreme Court characterized

it as follows (State ex rel. Marquette Hotel Investment Co. v. State Tax Commission, 221 S. W. 721, l. c. 722 and 726):

"The tax is levied, not upon the property itself, but upon the right of the corporation to transact business in this state. The references to the amount of the authorized capital stock and to the amount of the surplus are made solely for the purpose of pointing out a method of determining the amount of the tax. [* * * *]

"A franchise tax is not one levied upon property, but one placed on the right to do business. It may be graduated according to the extent of the business done. The act before us contemplates a tax upon the right to do business in accordance with the property actually used in the business."

The court below in this case (Rec. p. 27) said:

"It is designated as a 'franchise tax,' which as applied herein, we think is better described as an 'excise tax.' This term avoids confusion with the tax properly levied upon franchises as property. The construction by the Supreme Court of Missouri of the language of the legislature of Missouri, should not only be followed by this court, but we concur with the views of the Supreme Court of Missouri in the construction which they have placed upon the language of the act. It is quite apparent that the legislature in good faith, attempted to impose an excise tax."

Appellant admits (Appellant's Brief, p. 18) that "the act in its entirety clearly expresses an intention to lay a tax upon the privilege of transacting business in Missouri."

b.

Appellant is in error in asserting that the Supreme Court of Missouri in its opinion in the Marquette Hotel case, *supra*, held that the tax in question is "measured by the volume of

business." The opinion overruling motions for rehearing does say that "franchise taxes, to be fair, should be measured by the volume of business," and that "the volume of business can best be measured by the property used in the business," but that is far from saying that the law itself measures the tax by the volume of business. It is perfectly apparent from the reading of the law that the tax is not measured by the volume of business. No taxpayer is required to report its volume of business, nor any facts from which the volume of its business might be ascertained. The assessing commission would be wholly without any information or facts upon which to assess a tax measured by the volume of business. The term "volume of business" is not used in the act, nor is it referred to directly or indirectly.

The measure of the tax is the capital stock and surplus employed in business in the State, and the Supreme Court of Missouri so understood and held, as is apparent from the foregoing quotations from the language of the opinion.

The spirit of the law is, and the manifest purpose of the Legislature was, to measure the tax by the extent to which a taxpayer uses the privilege which is the subject of the tax, and the practical rule adopted for ascertaining the extent of the use was to ascertain the amount, that is, the value, of the property and assets employed in the exercise of the privilege.

c.

That a tax of this character is within the law authority of the State was held in *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, has been many times reaffirmed and never challenged, and, as we understand their position, appellant's counsel do not contend that the State may not levy a tax of this character, but assert that in some manner the particular tax is an unlawful imposition on appellant's interstate commerce.

It is said that any tax imposed by a state on property or franchises employed in interstate commerce to some extent affects that commerce, as it is obvious that the tax must be paid in part at least from the returns from such commerce and diminish them to the extent of the tax paid (U. S. *Glue Co.*

v. Oak Creek, 247 U. S. 321, L. e. 327). However, the rule is as stated in that case, page 326:

"It is settled that a state may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule."

The distinction between a state tax which directly burdens commerce between the states, and is, therefore, unlawful, and one which only indirectly affects such commerce, and which is, therefore, within the lawful authority of the state, is pointed out in *Armour & Co. v. Virginia*, 246 U. S. 1, L. e. 7, where it is said:

"In other words, to resume, the error of the argument results from confounding the direct burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed or because of the unlawful discriminations which its provisions express or by operation necessarily bring about and the indirect and wholly negligible influence on interstate commerce, even if in some aspects detrimental, arising from a statute which there was power to enact and in which there was an absence of all discrimination, whether express or implied as the result of the necessary operation and effect of its provisions. The distinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the court below, that principal as applied in adjudged cases is here directly applicable and authoritatively controlling. *New York v. Roberts*, 171 U. S. 658; *Reymann Brewing Co. v. Brister*, 179 U. S. 445. In saying this we have not overlooked or failed to consider the many cases cited in the argument at bar on the theory that they are to the contrary, when in fact they rest upon the conclusion that a direct burden on interstate com-

merce arose from statutes inherently void for want of power or if within the power possessed were intrinsically repugnant to the commerce clause because of discriminations against interstate commerce which they contained."

In this case there is no question of discrimination between taxpayers engaged in interstate commerce and those engaged in intrastate commerce only, nor between foreign and domestic corporations. The tax is laid alike upon all, on the same basis and at the same rate.

A state may levy a tax, which is within its lawful authority, measured by capital which is employed in part at least in interstate commerce.

K. C., etc., R. R. Co. v. Stiles, 242 U. S. 111, L. e. 119;
 K. C., etc., Ry. Co. v. Kansas, 240 U. S. 227, L. e. 232;
 U. S. Gine Co. v. Oak Creek, 247 U. S. 321, L. e. 326;
 Underwood Typewriter Co. v. Chamberlain, Sup. Ct. Rep. (Advance Sheets, Dec. 15, 1920), Vol. 40, p. 45;
 Baltic Mining Co. v. Massachusetts, 231 U. S. L. e. 82-83;
 Flint v. Stone-Tracy Co., 220 U. S. 107, L. e. 165;
 United States Express Co. v. Minnesota, 223 U. S. 335, L. e. 344.

It is said in the Stiles case, *supra*:

"So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in *Kansas City, etc., Railway Co. v. Kansas, supra*, is the nature and character of the tax imposed. The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances

are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consolidated under the state law, and engaged in both interstate and intrastate commerce."

Again, the rule is stated in *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 1. c. 82-83, wherein it is said:

"It is well settled and requires no review of the decisions of this court to that effect that the power of Congress over interstate commerce is supreme under the Federal Constitution and that the States may not burden such commerce, it being the purpose of the Constitution of the United States to bring commerce of this character under one supreme control and to vest the exercise of authority over it in the general government. It is equally well settled that forms of regulation prohibited to the State by the Constitution may consist of efforts to tax the carrying on of such commerce and of attempted levies of taxes upon the receipts of interstate commerce as such. *Galveston, Harrisburg, etc., Ry. Co. v. Texas*, 210 U. S. 217; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56; *Minnesota Rate Cases*, 230 U. S. 352, 400, and previous cases in this court therein cited.

"While this is true, other equally well established principles must be borne in mind in considering the validity of a state tax attacked upon grounds of unconstitutionality. The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. *United States Express Co. v. Minnesota*, 223 U. S. 335, 344. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital

are not taxed as such but are taken as a mere measure of a tax of lawful authority within the State, has been sustained. *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217; *Provident Institution v. Massachusetts*, 6 Wall. 611; *Hamilton Co. v. Massachusetts*, 6 Wall. 632; *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 162-5; *United States Express Co. v. Minnesota*, *supra*."

In *Flint v. Stone-Tracy Co.*, *supra*, the general principle is recognized in the following language:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. See in this connection *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, as interpreted in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 226."

The same rule is applied in *St. L. S. W. Ry. Co. v. Arkansas*, 235 U. S. 350; *Kansas City, etc., Ry. Co. v. Kansas*, 240 U. S. 227, and in many other cases.

We submit that the tax in question here is not distinguishable in principle from that under consideration in *St. Louis S. W. Ry. Co. v. Arkansas*, *supra*. The only difference is that the Arkansas tax was measured by capital stock, while the tax in the present case is measured by capital stock and surplus. As construed by the Supreme Court of Missouri, surplus simply means assets in excess of the par value of capital stock. In their essence both laws measure the tax by the

property and assets used or employed in business, and there is no difference in principle between taking the capital stock as the measure of the taxpayer's assets and in taking capital stock and assets in excess of the par value of the capital stock. Speaking of the Arkansas tax (page 365), the court said:

"Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within the state. It is fixed at a definite percentage (1-20 of one per cent.) of 'the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state,' and the act provides machinery for ascertaining the market value of the entire capital stock and striking a proportion between the value of the property owned and used by the corporation in the state and that owned and used by it outside of the state. In its essence the tax is not distinguishable from that which was sustained by this court in *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, and in another case between the same parties, 141 U. S. 40. See also *Pittsburgh etc. Ry. v. Backus*, 154 U. S. 421, 430, 435; *Indianapolis etc. R. R. v. Backus*, 154 U. S. 438; *Cleveland etc. Ry. v. Backus*, 154 U. S. 439, 441, 445; *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 18; *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 424."

We are unable to see any difference in principle between the method of apportioning the taxable income under the law of the state of Connecticut which was under consideration in *Underwood Typewriter Co. v. Chamberlain, Treasurer of the State of Connecticut* (decided by this Court November 15, 1920), Supreme Court Reporter, Vol. 41, No. 4, p. 45, and the rule of apportionment under the Missouri Corporation Franchise Tax Act. Under the Connecticut law an income tax

on foreign corporations engaged in interstate commerce was based on the proportion of the tangible property of the corporation within and without the state, and the Missouri law applies the same rule to apportioning or ascertaining the amount of capital stock and surplus employed in the State.

In discussing the objection that the Connecticut law imposes a tax on incomes arising from business conducted beyond the boundaries of the State, the Court said:

"It is contended that the tax violated the Fourteenth Amendment because, directly or indirectly, it is imposed on income arising from business conducted beyond the boundaries of the state. In considering this objection we may lay on one side the question whether this is an excise tax, purporting to be measured by the income accruing from business within the state, or a direct tax upon that income; for this argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution.' *Shaffer v. Carter*, 252 U. S. 37, 55, 40 Sup. Ct. 221, 226 (64 L. Ed. —). In support of its objection that business outside the state is taxed, plaintiff rests solely upon the showing that of its net receipts \$1,293,643.95 was received in other states and \$42,942.18 in Connecticut, while under the method of apportionment of net income required by the statute 47 per cent of its net income is attributable to operations in Connecticut. But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other states. In this it was typical of a large part of the manufacturing business conducted in the state. The Legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted

a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the state. 'The plaintiff's argument on this branch of the case,' as stated by the Supreme Court of Errors, 'carries the burden of showing that 47 per cent of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent of its gross earnings was derived after paying manufacturing costs.' The corporation has not even attempted to show this; and for aught that appears the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the state was inherently arbitrary, or that its application to this corporation produced an unreasonable result."

The same rule of apportionment for the purposes of assessing a state tax of the same general character was approved by this Court in *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350; *U. S. Express Co. v. Minnesota*, 223 U. S. 335, *l. c.* 340; and in *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321.

CONCLUSION.

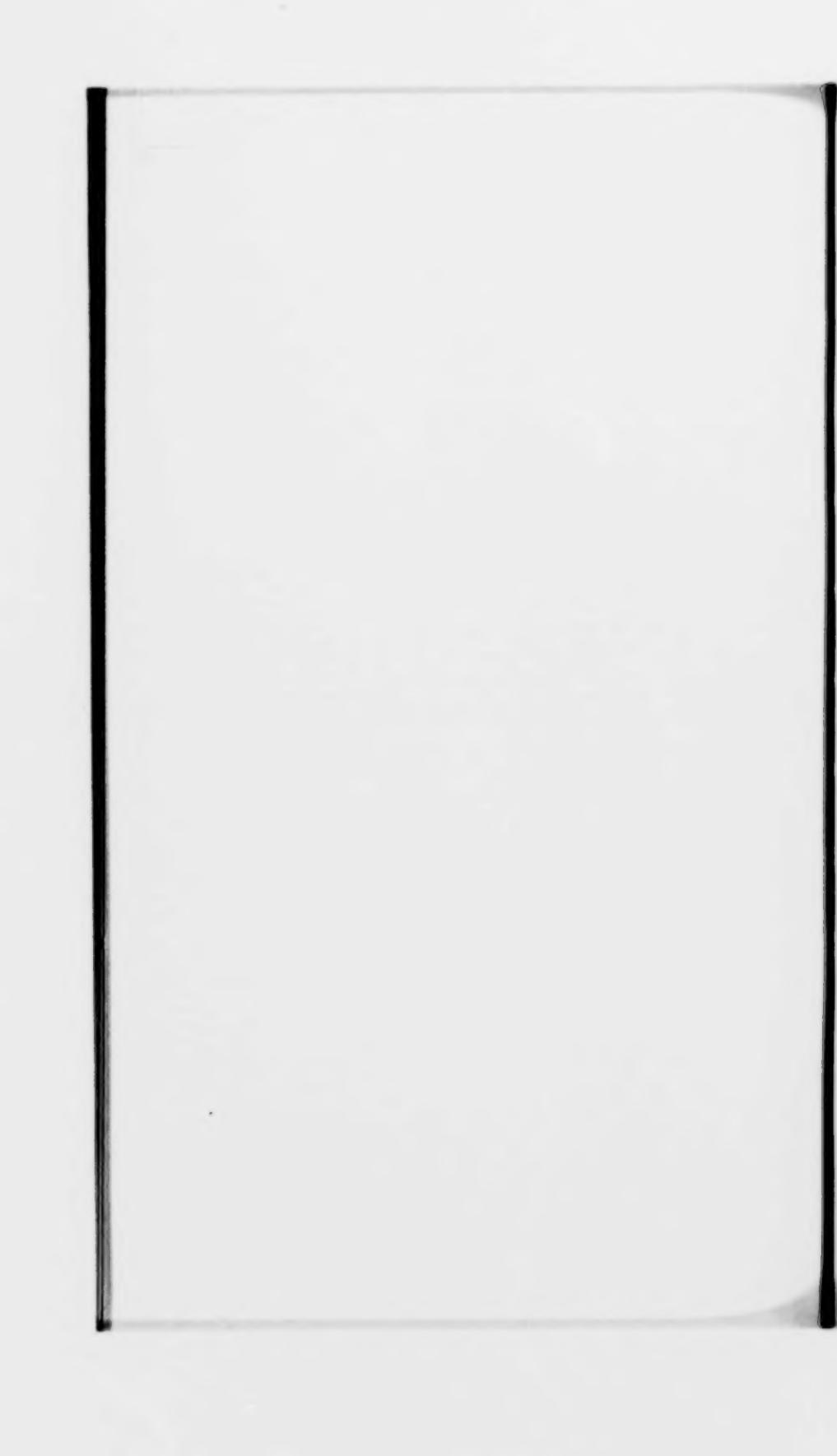
Believing that, for the reasons given, the imposition of the tax of which appellant complains does not invade any of its constitutional or legal rights, and that it is, therefore, not entitled to equitable relief against its enforcement, we respectfully urge the affirmance of the decree of the District Court.

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APPENDIX

(53)



APPENDIX A.

CORPORATIONS.

[H. B. 800]

CORPORATIONS. PRIVATE: FRANCHISE TAX.

AN ACT requiring domestic corporations and foreign corporations doing business in this state to pay an annual franchise tax; providing the method of procedure for ascertaining the amount thereof and for enforcing collection thereof; establishing a lien in support thereof; prescribing the duties of the state tax commission or of the state board of equalization, the state auditor, the state treasurer and other officers in connection therewith and prescribing the penalties and forfeitures for violations.

SECTION

1. Defining—tax—rate.
2. Corporations to make report, to whom—when—to contain, what.
3. State tax commission to determine amount—state auditor to make tax bills—when—taxes, when due, etc.
4. Written report, who shall make, etc.
5. Report to contain.
6. State tax commission, duties—annual fees.
7. Taxes, to be a lien.

SECTION

8. Delinquents—how collected—penalty.
9. Failure to make report, prosecuting attorney to bring action, etc.
10. Value of property—not to be set out, when.
11. Board may summon witnesses, take testimony, etc., when.
12. Powers of commission, etc.
13. Failure of commission—state board of equalization to act.
14. Repealing conflicting laws.

*Be it enacted by the General Assembly of the State of Missouri,
as follows:*

Section 1. Defining—tax—rate.—Every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to three-fortieths of one per cent of the par value of its outstanding capital stock and surplus, or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to three-fortieths of one per cent of its capital stock employed in this state, and for the purposes of this act such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located. Every corporation, not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the state of Missouri equal to three-fortieths of one per cent of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this act such corporation shall be deemed to have employed in this state that proportion of its entire cap-

ital stock and surplus that its property and assets in this state bears to all its property and assets wherever located; *provided*, that this act shall not apply to corporations not organized for profit, nor to express companies, which now pay [pay] an annual tax on their gross receipts in this state; and insurance companies, which pay an annual tax on their gross premium receipts in this state.

Sec. 2. Corporations to make report, to whom—when—to contain, what.—Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri tax commission, if it is in existence, and if not, then to the state board of equalization annually on or before the first day of February in such form as said commission or said board of equalization may prescribe. Such report shall be signed and sworn to before an officer duly authorized to administer oaths by the president, vice-president, secretary, treasurer or general manager of the corporation and shall contain the following:

1. Name of corporation.
2. The location of its principal business office.
3. The names of its president, vice-president, secretary, treasurer, and members of the board of directors, with the residence and postoffice address of each.
4. The amount of authorized capital stock.
5. The amount of capital stock subscribed.
6. The amount of capital stock issued and outstanding.
7. The amount of capital stock paid up.
8. The par value of the stock.
9. The clear market value of the stock.
10. The amount of surplus and undivided profits.
11. The nature and kind of business in which the corporation is engaged and the location of its place or places of business.
12. The clear market value of its property and assets in this state.
13. The clear market value of its property and assets without this state.
14. The clear market value of its total capital stock, surplus, property and assets.

15. The change or changes, if any, in the above particulars made since the last annual report.

Sec. 3. State tax commission to determine amount—state auditor to make tax bills—when—taxes, when due, etc.—The state tax commission, or the state board of equalization, as the case may be, shall, on or before the 20th day of February in each year, determine from the facts reported, and from any facts within or coming to its knowledge, the proportion of the capital stock and surplus of each corporation, employed in business in this state and the amount of the tax each corporation is liable to pay under the provisions of this act and shall report the same to the state auditor, who shall make out a tax bill therefor against each corporation and shall deliver the same to the state treasurer and charge him therewith. The taxes provided for in this act shall be paid on or before the 15th day of April in each year and shall be due and payable to the state treasurer without notice, who shall make out and deliver a receipt therefor, which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this act for the year ending on the 31st day of the following December.

Sec. 4. Written report, who shall make, etc.—Every corporation organized under the laws of this state and every foreign corporation engaged in business in this state and having no capital stock shall make a report in writing to the Missouri tax commission, or, if it is not in existence, to the state board of equalization, annually on or before the 1st day of February in such form as said commission or said state board of equalization may prescribe. The report shall be signed and sworn to before an officer authorized to administer oaths by the president, vice-president, secretary, treasurer, or other chief officer of the corporation, and forwarded to said commission or said state board of equalization, as the case may be.

Sec. 5. Report to contain.—Such report so made shall contain the following:

1. The name of the corporation.
2. The location of its principal office.
3. The names of the president, vice-president, secretary, treasurer, and members of the board of directors, with the postoffice address of each.

4. The date of annual election of officers.
5. The nature of the business in which such corporation is engaged.

Sec. 6. State tax commission, duties—annual fees.—

Upon the filing of the report provided for in sections 4 and 5 of this act, said commission or said state board of equalization, as the case may be, shall report to the state auditor on or before the 20th day of February of every year who shall charge and certify to the state treasurer on or before August 1st of every year for collection as herein provided a fee of twenty-five dollars for every corporation organized as a mutual insurance corporation not having a capital stock, or any other corporation not organized strictly for religious, charitable, or educational purposes and having no capital stock or of a company or association organized to transact business of life or accident insurance on the assessment plan for the purpose of mutual protection and benefit to its members and the payment of stipulated sums of money to the family, heirs, executors, administrators or assigns of the deceased member thereof. All foreign life, fire, accident, surety, liability, steam boiler, tornado, health, or other kind of insurance company of whatever nature coming within the provisions of sections 4 and 5 and doing business in this state having an outstanding capital stock of less than five hundred thousand dollars (\$500,000) shall pay an annual fee of fifty dollars (\$50.00) and all other such insurance companies having a capital stock of more than five hundred thousand dollars (\$500,000) an annual fee of one hundred dollars (\$100.00) for the privilege of doing business in this state and all building and loan associations to pay an annual fee to the state of twenty-five dollars (\$25.00) for the privilege of doing business in this state, in place of the fee based on the capital as hereinbefore provided.

Sec. 7. Taxes, to be a lien.—The taxes and penalties to be paid by the provisions of this act shall be a first lien on all property and assets of the corporation within this state.

Sec. 8. Delinquents — how collected — penalty.—

If any corporation fails or refuses to pay the taxes assessed against it under the provisions of this act on or before the first day of May the state treasurer shall certify a list of such corporations so delinquent to the attorney-general, who shall

proceed forthwith to collect the same, together with a penalty of twenty-five per cent and interest at the rate of one per cent per month. Suits for the collection of such taxes may be brought in the name of the state in any court of competent jurisdiction and any judgment rendered therein in favor of the state shall be a first lien on all the property and assets of the corporation within this state.

Sec. 9. Failure to make report, prosecuting attorney to bring action, etc.—If any corporation subject to the provisions of this act, shall fail or neglect to make the report herein required, or within the time herein required, such corporation, if organized under the laws of this state shall forfeit its charter, or if a foreign corporation shall forfeit its right to engage in business in this state and the attorney-general or, at his direction, the prosecuting attorney of the county in which such corporation has its principal business office, shall bring an action in the name of the state in some court of competent jurisdiction to annul the charter or revoke the license of such corporation to engage in business in this state.

Sec. 10. Value of property—not to be set out, when.—All insurance companies, building and loan associations, and other corporations, the fees of which are fixed at lump sums by this act, and all corporations which employ all their property and all their outstanding capital stock in this state shall all report and pay the fees on all its outstanding capital stock, whether employed in this state or not, shall not be required to set out in the report required by this act the value of its property within this state or without the state.

Sec. 11. Board may summon witnesses, take testimony, etc., when.—If any corporation subject to the provisions of this act fails or refuses to make full and complete answers to the questions contained in the report required to be filed by it, or if the tax commissioner or state board of equalization, as the case may be, finds that any answer or answers contained in said report are untrue, or if said tax commission or the state board of equalization, as the case may be, has reason to believe and does believe that any corporation has made a false statement or concealed any fact or facts which are material in determining the amount of tax for which such corporation is liable or ought to be liable under the

provisions of this act then said commissioners may require the delinquent corporation, its officers, agents or employees to furnish information concerning their capital stock which is necessary in determining the amount of tax to be paid by them and for that purpose said commission or said state board of equalization, as the case may be, may summon witnesses to appear and give testimony and to produce records, books, papers, documents, and all other information of any kind or character required relating to any matter necessary to be ascertained for the purpose of arriving at the amount of such tax to be paid. The witnesses may be summoned by subpoena issued by any member of such commission or the secretary thereof, in the name of the commission, if such commission be in existence, in the name of such board, directed to the sheriff of any county in the state and returnable to said commission or said state board of equalization, as the case may be, which subpoena shall be served in like manner and the same effect and under similar conditions as if issued out of the circuit court. Such commission or the state board of equalization, as the case may be, is also authorized to take depositions of witnesses residing within or without the state or absent therefrom, to be taken upon notice to the interested parties, if any, in like manner that depositions of witnesses are taken in civil cases in the circuit court in any matter which the commission may have authority to investigate and determine. Oaths of witnesses in any matter under investigation or consideration of such commission or state board of equalization, as the case may be, may be administered by the secretary or any member of such commission or the state board of equalization, as the case may be. In case any witness shall fail to obey any subpoena or summons to appear before said commission or shall refuse to testify or answer any material questions and to produce records, books, papers, or documents when required so to do; such failure or refusal shall be reported to the attorney general, who shall thereupon proceed in the proper course to compel obedience to any subpoena or summons or proper order of the commission or state board of equalization, as the case may be, and said commission or board may punish witnesses for any improper neglect or refusal.

Sec. 12. Powers of commission, etc.—Said commission or said state board of equalization, as the case may be, shall have power to appoint a commissioner to take testimony in any proceeding or inquiry arising under the provisions of this act and such commissioners may take testimony within or without the state and have all the power and authority of said commission or board of equalization to compel witnesses to appear and give testimony and to produce records, books, papers, documents, or other evidence; such commissioner shall return all testimony and evidence so taken to the commission or board of equalization and shall be allowed a reasonable compensation and expenses, including stenographic fees. Any witness who shall knowingly or willfully give false answers to any questions propounded in any such sworn examination where the fact inquired of is within his knowledge shall be deemed guilty of perjury. It shall be unlawful for any member of the Missouri tax commission or any member of the state board of equalization, as the case may be, or for any officer or employee of such commission or such state board of equalization, as the case may be, or for any other officer or employee of the state to divulge or make known in any manner whatever not provided by law to any person, any information obtained by them in the discharge of their official duties; or to divulge or make known in any manner not provided by law any document reviewed or evidence taken or report made under this act. Any offense against the foregoing provisions shall be a misdemeanor and shall be punished by a fine of not exceeding one thousand dollars (\$1,000.00) or by imprisonment in the county jail not exceeding six months.

Sec. 13. Failure of commission—state board of equalization to act.—In the event that the state tax commission is not created or in existence all the powers and duties of such commission under the provisions of this act shall devolve upon and be exercised and performed by the state board of equalization and in such event the state board of equalization may employ such stenographic and clerical and other assistance as may be necessary to the proper carrying out of the provisions of this act.

Sec. 14. Repealing conflicting laws.—All laws or parts of laws in conflict herewith are hereby repealed.

Approved April 9, 1917.

APPENDIX B.

IN THE SUPREME COURT OF MISSOURI
EN BANC.

OCTOBER TERM, 1919.

STATE OF MISSOURI, at the Relation of
MARQUETTE HOTEL INVESTMENT
COMPANY, Relator,

v.

THE STATE TAX COMMISSION, ROY D. No. 21,870.
WILLIAMS, H. CHOUTEAU DYER, W.
A. DALLMEYER, GEORGE E. HACK-
MANN and GEORGE H. MIDDELKAMP,
Respondent.

This is a proceeding by writ of certiorari issuing out of this Court, upon the petition of the Marquette Hotel Investment Company against the State Tax Commission, to determine the amount of tax due from relator under the act commonly known as the Franchise Tax Act. (Laws of Missouri, 1917, p. 237.) The relator, as required by the act above mentioned, filed its report with the State Tax Commission, showing assets of the amount of \$708,770.90, and liabilities in the amount of \$700,000.00, consisting of its capital stock, amounting to \$350,000.00, and indebtedness amounting to \$350,000.00, thus showing an excess of assets above capital stock and indebtedness in the sum of \$8,770.90. Respondent construed the Act of 1917, *supra*, to mean that the tax of three-fortieths of one per cent. by that act assessed should be calculated upon the basis of \$708,770.90, and determined the amount of the tax due from relator to be \$531.58. Relator contends that its indebtedness of \$350,000.00 should be deducted from its total assets, leaving a balance of \$358,770.90.

and that the amount of the tax due from it is, when computed on this balance, \$269.08. This sum it has tendered to the State Treasurer. The foregoing facts are substantially the facts set out in relator's application for the writ of certiorari, and upon these facts the writ was issued.

The respondent demurred to the writ, on the ground that it did not state facts sufficient to constitute a cause of action against respondent, and because upon its face it showed that relator is not entitled to the relief prayed. The cause is submitted upon the issues thus made up.

OPINION.

The statute in question is denominated a franchise tax in the title, and in the first section of the act. In relator's brief, the first point made is that this is "a franchise tax and not a tax upon property." Respondent in its brief states that it "readily agrees with relator that the franchise tax is not a property tax." Since the lawmaking body and the contending parties are agreed upon this point, we think we may safely assume that this is a franchise tax, and so dispose of relator's contention number one.

The real difference between the parties here is embraced within a very narrow scope. Section 1 of the act *supra*, in so far as it relates to the matter here in issue, is as follows: "Every corporation organized under the laws of this state shall * * * * pay an annual franchise tax to the state of Missouri equal to three-fortieths of one per cent. of the par value of its outstanding capital stock and surplus * * * ." There is no controversy between the parties to this action concerning the liability of the relator to pay the tax upon the amount of its outstanding capital stock, which is \$350,000. The whole controversy hinges upon the interpretation to be placed upon the word "surplus" as used in the statute. Surplus, *ex vi termini*, implies an excess. Relator's contention is that, as used in this act, surplus means the excess of assets over liabilities other than stock liability. Respondent, on the other hand, contends that the surplus is the excess of the gross assets over the total outstanding capital stock, and that the amount of relator's indebtedness is an irrelevant circum-

stance. By respondent's reasoning, the tax should be based upon the total sum of \$708,770.90. By relator's reasoning, the amount upon which the tax should be calculated is \$358,770.90.

We are indebted to the diligence of counsel for relator for a large number of citations of cases in which "surplus" is defined. We have read all of these cases with interest, but, it must be confessed, with little profit. In each instance, the word as used in the case cited is obviously, and usually expressly, confined to the particular context in which it is used, and to the subject matter under discussion. No case cited is sufficiently analogous to be of much assistance. The result is that we are forced to turn to a study of this particular act, and to endeavor, as best we may, from its somewhat confused and cloudy phraseology, to ascertain what the real intention of the Legislature was. It goes without saying that the cardinal rule of statutory construction is to ascertain the intention of the law-making body, and as far as possible to give effect to the intention expressed.

The ordinary meaning of the word "surplus," as found in the standard lexicons, is "that which remains when use or need is satisfied; excess; overplus." As defined in various decisions, surplus means "the amount of the residue of the assets after the liabilities have been deducted" (*Anderson v. Farmers' Loan & Trust Co.*, 241 Fed. Rep. 322, l. c. 327), or "the net assets over and above the liabilities" (*People ex rel. v. Purdy*, 146 N. Y. Supp. 646). A method of ascertaining the amount of the surplus is pointed out in *Fidelity Trust Co. v. Board of Equalization*, 77 N. Y. Law Reports, 128, l. c. 130, as follows: "In order to ascertain the capital and surplus, it is necessary to find the true value of the gross assets. From this must be deducted debts and liabilities. The remainder will be the value of the capital and surplus, if any." All of these authorities tend to support relator's contention.

In each instance above cited, however, as well as in all others which have been called to our attention, the definition given or the method pointed out by which the surplus may be ascertained, is confined either in express terms, or by necessary implication, to the particular case and facts under consideration. We think it must be so confined in this instance.

It clearly appears, by reference to Sections 1 and 2, that the fundamental idea in the mind of the Legislature was that a corporation doing business wholly in this state should be taxed under the provisions of this act upon two things, first, upon the amount of its outstanding capital stock, regardless of the value of its assets, whether more or less than the amount of the outstanding capital stock, and second, upon any surplus property employed in its business in this state. The tax is levied not upon the property itself, but upon the right of the corporation to transact business in this state. The references to the amount of the authorized capital stock and to the amount of the surplus are made solely for the purpose of pointing out a method of determining the amount of the tax. It is, of course, obvious that a corporation may be authorized to issue a very limited amount of capital stock, and may, in fact, in the case of a domestic corporation, have outstanding only one-half of the capital stock which it is authorized to issue. But the amount of capital stock outstanding is by no means the measure of the amount of capital which the corporation may use in its business. It commonly happens that upon the organization of a corporation, all or so much of its capital stock as is required by law to be paid up, is paid up, and in addition thereto a sum is contributed by the stockholders as a means of establishing and reenforcing the credit of the corporation. There is no limit to the amount which may be so contributed. A corporation organized and authorized to issue capital stock in an amount not exceeding two thousand dollars may borrow and employ in its business any sum whatever. The result is that a corporation with a minimum stock subscription may actually employ huge sums of capital in its business. It might well happen that no part of this total employed in business, in excess of the amount of the outstanding capital stock, would be *supus* in the ordinary acceptation of that term. If this excess were borrowed money, the amount so borrowed would constitute a liability, but the corporation would nevertheless be employing the amount of that liability in business. The money so borrowed, or the property purchased with that money, would be *assets* of the corporation. The corporation would have the right to use and actually would be using under its

franchise, not only the amount of its outstanding capital stock, but all of the money so borrowed. This it has a right to do, and it is that right which the General Assembly intended to tax by the enactment of the statute here in question. If relator's theory is correct, and all liabilities must first be deducted in order to ascertain what the surplus is or whether or not there is any surplus, it would be an easy matter for a corporation practically to escape the tax levied by this law, and nevertheless to enjoy all the benefits of a franchise to do business in this state with assets circumscribed only by the limits of its ability to borrow money or to contract debts. It can not be supposed that the Legislature intended such a condition to exist. Neither can it be supposed that a possibility so obvious escaped the legislative attention. It necessarily follows that, in view of the language of Sections 1 and 2, and of the whole purpose of this act, as disclosed by the act itself, the Legislature must have intended the word surplus to mean the difference between the amount of the outstanding capital stock of a wholly domestic corporation, such as relator is, and the amount of the assets of that corporation, excluding liabilities of all sorts. Were the rule otherwise, this peculiar condition might exist: A corporation might accumulate a surplus of \$100,000.00 which it could either use in its business or distribute in dividends to its stockholders. If it used this sum in its business, its franchise tax would then be based upon the amount of its outstanding capital stock, plus \$100,000.00. But if it distributed this same \$100,000.00 as dividends to its stockholders and immediately borrowed it back from them and employed it in its business, the franchise tax upon relator's theory, would be based upon the outstanding capital stock alone. In other words, the amount of the franchise tax would depend on the method of book-keeping employed. A statute is not to be so construed as to produce an absurdity. Clearly, in this case the Legislature meant by surplus, the excess of assets employed in the business over outstanding capital stock, without regard to liabilities.

It is in harmony with this idea that respondent has levied the tax upon relator which is here called in question. We

think respondent correctly construed the law, and that the writ of certiorari heretofore issued by us should be quashed. It is so ordered.

All concur, except Woodson, J., who dissents; Graves, J., in separate opinion.

JOHN L. WILLIAMSON,
Judge.

IN THE SUPREME COURT OF MISSOURI
IN BANC, OCTOBER TERM, 1919.

JANUARY CALL.

STATE OF MISSOURI, at the relation of Mar-
quette Hotel Investment Company, Relator,
vs.

THE STATE TAX COMMISSION, Roy D.
Williams, H. Chouteau Dyer, W. A. Dall-
meyer, George E. Hackmann and George H.
Middelkamp, Respondent.

No. 21870.

Separate Concurring Opinion.

I.

I concur with our learned brother in the disposition that he makes of the term "surplus" as used in the Act of 1917, Laws of 1917, p. 237. I agree with him that the purpose of the law was merely to fix a basis for a franchise tax, and that the word "surplus" as therein used means the property used in the business, in excess of the capital stock, without consideration of debts or liabilities. But I have had trouble with Sec. 10 of the Act, in determining whether or not the corporation here involved had to report such "surplus," and thereby subject it to the franchise tax. This is the reason for this separate concurrence, and an analysis of the Act itself, which follows. In this analysis, we shall confine ourselves to those portions of the Act which relate solely to a Missouri corporation, which employs all its capital stock, and other property in this state, for such is the status of the complaining corporation here.

II.

The Act of 1917, *supra*, is composed of 14 sections, including the section which repeals previous conflicting laws. Now taking a Missouri corporation which employs all that it has (capital stock and other property) in this state, let us get the applicatory law. With the exception of the sense in which the term "surplus" is used in the Act and the further exception of the conglomerated phrases of Sec. 10 of the Act, the law is reasonably clear. It covers several classes of corporations, and refers to fixed fees as to some, and franchise taxes as to others.

Section 1 of the Act refers to six classes of corporations: (1) Missouri corporations, which employ all their stock and other property in Missouri, (2) Missouri corporations which employ only a part of their stock, and other property in Missouri, (3) foreign corporations, (4) corporations not organized for profit, (5) express companies and (6) a class of insurance companies. As to class one, *supra*, this section reads: "Every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to three-fortieths of one per cent of the par value of its outstanding stock and surplus."

The 4th, 5th and 6th classes, *supra*, are exempted in the proviso of the section, for reasons which are clear. Sec. 2, then thus provides:

"Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri tax commission, if it is in existence, and if not, then to the state board of equalization annually on or before the first day of February in such form as said commission or said board of equalization may prescribe. Such report shall be signed and sworn to before an officer duly authorized to administer oaths by the president, vice-president, secretary, treasurer or general manager of the corporation and shall contain the following:

1. Name of corporation.
2. The location of its principal business office.

3. The names of its president, vice-president, secretary, treasurer, and members of the board of directors, with the residence and postoffice address of each.
4. The amount of authorized capital stock.
5. The amount of capital stock subscribed.
6. The amount of capital stock issued and outstanding.
7. The amount of capital stock paid up.
8. The par value of the stock.
9. The clear market value of the stock.
10. The amount of surplus and undivided profits.
11. The nature and kind of business in which the corporation is engaged and the location of its place or places of business.
12. The clear market value of its property and assets in this state.
13. The clear market value of its property and assets without this state.
14. The clear market value of its total capital stock, surplus, property and assets.
15. The change or changes, if any, in the above particulars made since the last annual report."

Paragraphs 12, 13 and 14 clearly provide for a corporation of the class here involved to report the very property found in the report of this corporation, and from which the tax commission has found and fixed the tax complained of in this action.

Section 3 of the Act covers the duties of the Tax Commission, and serves no special purpose in this out-line. Sections 4 and 5 deal with corporations (domestic and foreign) which do business in this state, but which have no capital stock. The latter provides the form of report for the same. Section 6 provides for certain fees to be collected annually from the corporations covered by sections 4 and 5, and also for certain annual fixed fees for certain other corporations therein mentioned. Neither of these sections (4, 5 and 6) have any application to the complaining corporation here, but we give this out-line, for the purpose of trying to get a meaning out of section 10 of the Act.

Section 7 makes the franchise taxes and penalties a lien upon the property, and serves no real purpose for this dis-

cussion. Section 8 provides for a suit to collect the taxes, and section 9 provides for a forfeiture of charter and license rights for failure to report under the Act. The only other material section is section 10, which reads:

"All insurance companies, building and loan associations, and other corporations, the fees of which are fixed at lump sums by this act, and all corporations which employ all their property and all their outstanding capital stock in this state shall all report and pay the fees on all its outstanding capital stock, whether employed in this state or not, shall not be required to set out in the report required by this act the value of its property within this state or without the state."

If there ever was a conglomerated mass in a section of a statute, it is to be found in this section 10. If you strike out from this section the clause, "and all corporations which employ all their property and all their outstanding capital stock in this state shall all report and pay the fees on all its outstanding capital stock, whether employed in this state or not," then the remainder would harmonize with all that has gone before in the previous sections. This because the previous sections have dealt with both franchise taxes, and fixed annual fees. With this clause cut out, the section would refer to and thoroughly fit in section 6, *supra*, which is the fixed fee section, and not the general franchise tax sections. With the foregoing clause in section 10, there is apparently a conflict between section 10 and sections 1 and 2, *supra*. This upon the theory that you can make any sense out of the clause at all. This clause in the first part thereof refers solely to corporations which employ all stock and property in this state. Yet it is followed up by the incomprehensible phrase "*shall all report and pay the fees on all its outstanding capital stock, whether employed in this state or not.*" Just how a corporation of the class just named in the first clause (a corporation using all its stock and property in this state) could have some of its capital stock in use in some other state is not made plain. But be this as it may, there is one thing which is plain. This clause only refers to "*fees on all its outstanding capital stock*" and there is no provisions for fees upon stock (for corporations of the class here involved) in the

whole Act preceding section 15. There is a specific provision for a franchise tax, but a franchise tax is not a fee. This because section 6, supra, provides for fixed annual fees, thus distinguishing between franchise taxes and fixed fees. The clause is therefore meaningless in this act, and it should be so declared. I therefore concur in the opinion of our learned brother.

W. W. GRAVES, J.

IN THE SUPREME COURT OF MISSOURI

IN BANK

APRIL TERM, 1920.

STATE EX REL. MARQUETTE HOTEL
INVESTMENT COMPANY, Relator,

vs.

STATE TAX COMMISSION, Roy D. Williams,
H. Choteau Dyer, W. A. Dallmeyer, George
E. Hackmann and George H. Middelkamp,
Respondents.

No. 21870

OPINION ON MOTION FOR REHEARING.

Per Curiam:—A franchise tax is not one levied upon property, but one placed on the right to do business. It may be graduated according to the extent of the business done. The act before us contemplates a tax upon the right to do business in accordance with the property actually used in the business.

Franchise taxes, to be fair, should be measured by the volume of business. The volume can best be measured by the property used in the business. To illustrate, one corporation has \$1,000.00 of its own, and starts a business with it as its capital stock. It keeps within its capital stock. The volume of its business of necessity is small. On the other hand, another corporation has \$1,000.00 of its own (in capital stock) and borrows \$49,000, and with the \$50,000 starts the same kind of business. It should do many times the business of the other and its tax upon the right to do business should be proportionately greater.

With this idea of a franchise tax, it is hardly fair to the Legislature to say that in the use of the word "surplus" it means the mere excess of assets over liabilities. To give it

such a construction would not proportion the tax to the business done, as illustrated above by the two supposed corporations. With the two supposed corporations, giving the term "surplus" the construction for which counsel contend, we would have both paying the same tax, and yet one doing a business many times larger than the other, because of the money actually used in the business. It would get the profits of an increased business, whilst paying only a nominal franchise tax for the right to do that business. So that, notwithstanding the great list of briefs filed by friends of the court upon the motion for rehearing, we are of the opinion that we properly construed the term "surplus" in this franchise tax measure.

II.

We have also read with pleasure the briefs discussing the construction of section 10 of the act given by the separate concurring opinion. It may be that the writer of the Missouri act (generally known not to have been the Legislature, or any member thereof) had in mind to borrow from the Arkansas law, but if he failed to borrow the law, we are left to give the best construction we can of what has been presented to the court for construction. We are fully satisfied with the construction that we there placed upon this section 10 of the law before us.

The status of bank deposits is not discussed in the opinions heretofore written, and should not be discussed now. Whether they constitute the working assets of a bank or trust company should be left to a case where such is a live issue. We have troubles enough with the questions in the particular cases, without extending the inquiry to outside problems. The motion for rehearing should be overruled. It is so ordered.

All concur except Woodson, J., absent, and Goode, J., who dissents in opinion filed.

APPENDIX C.

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE CENTRAL DIVISION OF THE WESTERN
DISTRICT OF MISSOURI.**

St. Louis-San Francisco Railway Company, Plaintiff

vs.

George H. Middelkamp, State Treasurer of the State of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

OPINION.

Per Curiam.

This case came on for hearing upon an application for a temporary injunction, before Kimbrough Stone, Judge of the Court of Appeals of the Eighth Judicial Circuit, Arba S. Van Valkenburgh, Judge of the District Court of the United States for the Western District of Missouri, and Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa.

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and is a resident and citizen of said state.

Defendant George H. Middelkamp is the Treasurer of the State of Missouri, and Frank W. McAllister is the Attorney General of said State.

(1) By this petition in equity, the plaintiff challenges the validity and constitutionality of a certain Act of the Legislature of the State of Missouri, approved April 9, 1917, which Act provides for a "franchise tax" upon every corporation organized under the laws of the State of Missouri equal to 3-10 of one per cent of the par value of such corporation's outstanding capital stock and surplus; or if part of its capital stock is employed in business in another State or country, a

tax equal to 3-40 of one per cent of its capital stock employed in the State of Missouri. Provision is also made for payment of a like tax by corporations not organized under the laws of the State, but doing business within the State. The details of the Act will be hereafter more fully referred to.

(2) THE NATURE OF THIS TAX. A careful reading of the entire statute convinces us that the tax provided for is an excise tax—not a property tax. This is apparent not only from the language used, but from the further fact which appears of record, that the State of Missouri before this enactment by the Legislature, imposed taxes upon property tangible and intangible, including the value of franchises, such as the right of way, depot grounds, etc.

We cannot assume that the legislature by this act intended to impose additional burdens upon the property of the plaintiff.

Furthermore, the Supreme Court of Missouri, construing this Missouri Statute (State of Missouri ex rel. vs. The State Tax Commission, et al., filed April 9, 1920, and *id.*, upon rehearing, filed May 18, 1920), specifically holds that this Act does not provide for a property tax. It is designated as a "franchise tax," which as applied herein, we think is better described as an "excise tax." This term avoids confusion with the tax properly levied upon franchises as property. The construction by the Supreme Court of Missouri of the language of the legislature of Missouri should not only be followed by this court, but we concur with the views of the Supreme Court of Missouri in the construction which they have placed upon the language of the Act. It is quite apparent that the legislature, in good faith, attempted to impose an excise tax.

(3) THERE CAN BE NO QUESTION ABOUT THE POWER of the legislature of Missouri to impose such an excise tax. The existence of such power, and the right to exercise such power, has been repeatedly sustained. *Shaffer vs. Carter*, 40 Sup. Ct. 221 (decided March 1, 1920), in which it is said:

"In our system of government the states have general dominion, and save as restricted by particular provisions of the Federal Constitution, com-

plete dominion over persons, property and business transaction within their borders, they assume and perform the duties of preserving and protecting all such persons, property, and business, and in consequence have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray governmental expenses. Certainly they are not restricted to property taxation, NOR TO ANY PARTICULAR FORM OF EXCISES."

"Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the State government. Authority to that effect resides in the State independent of the Federal Government." Society for Savings vs. Coite, 6 Wallace, 594; 18 L. Ed. 897. Quoted and approved, Flint vs. Stone-Tracy Co., 220 R. S. 107-164, 55 L. Ed. 389.

(1) Missouri having the power to impose an excise tax upon the plaintiff, and having in fact imposed an excise tax—not a property tax, the next question, and practically the only question remaining is, whether in fixing the measure of such tax—the method by which the amount of such tax should be determined, the legislature has violated any of the rights of the plaintiff under the Constitution of the United States, or the Constitution of the State of Missouri.

Of course there must be some measure by which the amount of an excise tax must be determined, and this measure must be practical.

"The tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations." Flint vs. Stone Co. supra, at page 165.

(5) THE STATE OF MISSOURI CANNOT IMPOSE ANY OBLIGATION OR BURDEN UPON INTER-

STATE COMMERCE; but under the requirements of the statute in controversy, we cannot agree with counsel that the legislature has in any manner imposed any such burden. It is true of course that the plaintiff being engaged in interstate commerce and intrastate commerce, its income is composed in part of proceeds of interstate commerce; but this, under numerous decisions of the Supreme Court of the United States, does not invalidate the tax. Justice Pitney in the recent case of Shaffer vs. Carter, *supra*, says:

"It is urged that, regarding the tax as imposed upon the business conducted within the state, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the state. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in *Crew Co. vs. Pennsylvania*, 245 U. S. 292; 38 Sup. Ct. 126; 62 L. Ed. 295; but only upon the net proceeds, and is plainly sustainable, even if it includes net gains from interstate commerce. *U. S. Glue Co. vs. Oak Creek*, 217 U. S. 221; 38 Sup. Ct. 499; 62 L. Ed. 1135."

In *Rialto Mining Co. vs. Massachusetts*, 231 U. S. 68, it is said:

"The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the state, has been sustained."

In *St. Louis S. W. Ry. Co. vs. Arkansas*, 235 U. S. 350, Justice Pitney says:

"This, however, does not mean, as is contended, that because of the Fourteenth Amendment a State may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the state, **INCLUDING THAT EMPLOYED IN INTERSTATE COMMERCE.**"

He further says:

"It is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use."

Justice Hughes, in *Kansas City, Fort Scott & Memphis Railway Company vs. Kansas*, 240 U. S. 227, expresses the same view in the following language:

"It is also manifest that the state is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce."

Justice Hughes further says:

"The selected measure may appear to be simply a matter of convenience in computation, and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority."

He then refers to the Baltic case, and says:

"If the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

Justice Day, in *Kansas City Co. vs. Stiles*, 242 U. S. 111, concurs in the views of Justice Hughes, and says:

"The state may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital, in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character."

Further quotation would seem to be unnecessary, though the utmost unlimited power of the state in the field of taxation is well illustrated in numerous recent cases. See *Fort Smith Lumber Co. vs. State of Arkansas*, 40 Sup. Ct. 301. *Askren, Attorney General, vs. Continental Oil Co. et al.*, 40 Sup. Ct. 355; *Maxwell vs. Bugbee*, 40 Sup. Ct. 2; *Baldwin Tool Works et al. vs. Blue*, 210 Fed. 202; *N. W. Mutual Life Insurance Co. vs. State of Wisconsin*, 217 U. S. 132; 62 L. Ed. 1025.

(6) OTHER NON-TAXABLE PROPERTY. It is here suggested that the Act permits the inclusion for taxation of property beyond the limits of the state, which is not subject to taxation in the State of Missouri.

"But this argument confuses the measure of the tax upon the privilege, with direct taxation of the estate or thing taxed, * * * * Where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the state or nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such, and to measure a legitimate tax upon the privileges involved in the use of such property."

"It is no objection that the measure of taxation is found in the income produced in part from property, which of itself considered is non-taxable."

"It is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed." *Flint vs. Stone-Tracy Co.*, *supra*.

The act complained of in this case measures the tax by the par value of its capital stock and surplus employed in business in this State." To determine this it provides—

"Such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located."

This language obviously contemplates property not only within the state, but used in business transacted within the state. It is true that the standard provided may not operate with absolute justice, equality and exactness, but it is fairly and reasonably intended so to do.

As there are between fourteen and sixteen thousand corporations in Missouri subject to this tax, which must be calculated and assessed annually, it would be impracticable to compel methods requiring exactness. The basis of such measurement must for practical reasons be such as may be readily applied. Such a practical rule exceeds no constitutional limitation, for it honestly endeavors to provide a method which is not obviously unwarranted and arbitrary.

(7) ALLEGED DISCRIMINATION IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF MISSOURI. We find no justification for alleged discrimination in violation of the Constitution of the United States, or the Constitution of Missouri. *Northwestern Mutual Life Insurance Co. vs. State of Wisconsin*, *supra*, clearly sustains the right of the legislature to impose different rates and different methods of taxation upon "old line" insurance companies, fraternal insurance companies, religious and educational corporations and associations.

In Baldwin Tool Works, et al. vs. Blue, *supra*, the opinion of Circuit Judges Prichard and Woods and District Judge Waddill, disposes of many of the questions of discrimination alleged by the plaintiff in this case.

In Flint vs. Stone Tracy Co., *supra*, the Supreme Court of the United States says:

"In levying excise taxes, the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation; to select one calling, and omit another, to tax one class of property and forbear to tax another."

And the court in the margin sets forth many different cases illustrative of this power to impose an excise tax upon any and every line of business. Of course upon the same line of business substantial equality is required; while a state might impose a tax upon a pool hall, it could not arbitrarily impose a higher tax upon one pool hall than upon another. A state might impose an excise tax upon theaters or motion picture houses, but such tax would not be invalid, because it varied from the tax imposed upon a pool hall.

Taxation is equal when the tax is substantially the same upon all persons or corporations engaged in the same line of business, but there is not inequality when the legislature imposes a certain excise tax upon all corporations organized and operating for pecuniary profit, and exempts from such tax, corporations organized for religious or educational purposes only; nor is there inequality because the legislature chooses to impose a different method of taxation upon express companies.

In Bell's Gap Co. vs. Pennsylvania, 134 U. S. 232, it is said:

"The provision in the 14th amendment that no state shall deny to any person within its jurisdiction, the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any tax at all—such as churches, libraries, and the

property of educational institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products. It may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money, etc."

This quotation was approved in the *Flint v. Stone* case, *supra*. See also *Armour & Co. vs. Commonwealth of Virginia*, 216 U. S. 1, 62 L. Ed. 547.

See also *Maxwell vs. Bugbee*, *supra* in which Justice Day gives extended discussion to the 14th Amendment in relation to inheritance taxes imposed by the state.

(8) **THE ALLEGED VIOLATION OF CONTRACT BY THE STATE OF MISSOURI.** We cannot concur in the contention that because this corporation paid the fees imposed by the State upon its organization, it thereby acquired perpetual exemption from payment of excise tax. We find no such purpose indicated in the law of Missouri by which the plaintiff was authorized to incorporate. *Central of Georgia Ry. Co. vs. Wright*, 40 Sup. Ct. 1.

(9) **THE MEANING OF THE WORD "SURPLUS,"** used by the legislature in fixing the measure by which the tax shall be computed, has already been determined by the Supreme Court of Missouri in *State ex rel. Marquette Hotel Investment Co. vs. State Tax Commission, et al.*, *supra*. This construction of this state statute is binding upon this court. We may say, however, that in our present view, the construction of the Supreme Court of Missouri, is correct.

(10) **OTHER QUESTIONS HAVE BEEN DISCUSSED BY COUNSEL,** but in our view the foregoing disposes of all points necessary to a final determination of this case.

The petition recites that the assessment made by the State Tax Commission, was based entirely upon the report made by the plaintiff. The petition recites that "said Tax Commission did thereupon find the facts to be as stated in said written report theretofore filed with said State Tax Commission by plaintiff, except as to the item of surplus,

and that plaintiff was liable to pay under the provisions of said franchise tax, as a franchise tax for said year ending December 31, 1919, the sum of \$92,119.99."

Therefore, holding as we do, that the enactment of the legislature is valid, and that the word "surplus" was properly construed by the Tax Commission, it is our duty to deny the temporary injunction, and it is so ordered.

June 29, 1920.

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FILED

MAR 12 1921

JAMES D. MAHER,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

ST. LOUIS - SAN FRANCISCO RAILWAY
COMPANY, Appellant,
vs.
LARENZO D. THOMPSON, State Treasurer of
the State of Missouri, and JESSE W. BAR-
RETT, Attorney-General of the State of
Missouri, Appellees.

APPELLEES' BRIEF IN REPLY TO BRIEF AND ARGU-
MENT OF SOUTHWESTERN BELL TELEPHONE
COMPANY, ET AL, AMICI CURAE, UNDER
LEAVE GIVEN UPON ORAL ~~JUDGMENT~~
argument.

JESSE W. BARRETT,
Attorney-General of Missouri,
MERILL E. OTIS,
Assistant Attorney-General,
FRANK W. McALLISTER,
Solicitors for Appellees.



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IN THE
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OCTOBER TERM, 1920.

ST. LOUIS - SAN FRANCISCO RAILWAY
COMPANY, Appellant,

vs.

LARENZO D. THOMPSON, State Treasurer of
the State of Missouri, and JESSE W. BAR-
BETT, Attorney-General of the State of
Missouri, Appellees.

No. 636.

APPELLEES' BRIEF IN REPLY TO BRIEF AND ARGU-
MENT OF SOUTHWESTERN BELL TELEPHONE
COMPANY, ET AL., AMICI CURAE, UNDER
LEAVE GIVEN UPON ORAL ~~ARGUMENT~~
Arguement.

POINT I.

In their brief appellant's counsel assert that the statute in question here violates the "due process" clause of the Constitution of the United States, because "it fails to provide for any notice, hearing or review for the tax-payer either before or after the assessment of the tax." To this counsel for appellees replied in their brief that the only method by which payment of the tax can be enforced is by a suit in a court of competent jurisdiction as provided in section 8 of the act, and that that provision meets the requirements of the "due process" clause, as held by this court.

In the brief of amici curiae our answer to appellant's argument is met by the assertion that in a suit for the collec-

tion of the tax the tax-payer would be precluded from attacking the validity or legality of the assessment and for that reason such suit does not afford the tax-payer such an opportunity to be heard as to satisfy the "due process" requirement. They cite the case of *State ex rel. Johnson v. Merchants & Miners Bank, et al.*, 279 Mo. 228 (213 S. W. 815), and upon the oral argument appellant's counsel adopted that theory and argued that in such suit the only defenses open to defendant are want of jurisdiction in the commission assessing the tax and fraud entering into the action of the commission and asserted that this contention is supported by the *Johnson* case, *supra*.

A.

In reply to the above contention of *amici curiae* and appellant's counsel in oral argument, we submit the following:

1. *That the doctrine announced in the Johnson case, supra, and the cases it cites, have no application in the assessment of the tax here in question nor to suits to recover the same, for the reason that the special provisions and proceedings for the assessment and collection of the general property, or *ad valorem*, taxes do not apply to the assessment and collection of the taxes under this act.*
2. *That neither the Johnson case, nor any of the cases it refers to, support the contention of *amici curiae* and appellant's counsel that the courts are precluded by the action of the State Board of Equalization on all questions except want of jurisdiction and fraud in a suit on the property tax bill.*

I.

There is no support for the statement that the provisions of the Missouri Statutes for the assessment and collection of the general property, or *ad valorem*, taxes apply to the assessment and collection of the tax under the act here involved. The act of 1917 purports to provide a complete scheme for the levy, assessment and collection of the corporation franchise, or excise, tax. It makes no reference directly or indirectly to any provisions of the statutes for the assessment or collection of the property taxes, and provides as the only means for enforcing collection suits "brought in the name of the state in

any court of competent jurisdiction." We assert, as a proposition that needs no authority to support it, that this necessarily means an ordinary suit under and controlled by the provisions of the general civil code of Missouri found in Chapter 12, Revised Statutes of Missouri, 1919. Under these provisions the defendant may plead any defense he has, legal or equitable, to the cause of action stated in the petition. Undoubtedly the legislature by remitting the state to a suit under the provisions of the general code placed it in the position of a private litigant.

The provisions for the assessment and collection of the general property, or ad valorem, taxes are found in Chapter 119 of the Revised Statutes of Missouri, 1919, and the particular provisions providing the scheme for the enforcement of payment of said taxes are found in Article IX of that chapter. It is clearly apparent that none of the provisions of Chapter 119, *supra*, apply to the assessment or collection of any taxes except the general property taxes of the state.

There is a vital difference in the very nature of the proceeding and action taken between the final judgment of the State Board of Equalization in adjusting and equalizing the valuations of all classes of taxable property in all of the counties of the state as the basis for the levy and collection of the property or ad valorem taxes, and the act of the State Tax Commission in determining the amount and assessing the tax under this act. The valuation fixed by the State Board of Equalization on any class of property in any county depends upon the valuation they fix upon every other class of property in every county in the state and by its very nature its judgment that the values fixed on any particular class of property in any county in the state are in the same proportion of value as all other classes of property in every other county in the state must be final and conclusive. In this particular and for this reason, the courts have said that its judgment as to the equalization of values cannot be attacked collaterally but only directly for fraud.

The State Tax Commission in examining the tax-payers report and computing the amount of its franchise or excise tax is of an altogether different nature and will therefore be

adjudged by altogether different rules. The amount of any particular tax-payer's tax or the value of its property and assets for the purpose of determining its franchise or excise tax does not depend upon, nor is it affected by, the amount of the tax or the value of the property or assets of any other tax-payer. In other words, the assessment of the franchise or excise tax against each particular tax-payer is a complete act within itself and is not in anywise connected with or dependent upon the assessment of the tax of any other tax-payer. There is, therefore, no reason why its action and every step it takes in the assessment of the tax may not be fully inquired into in a suit on the tax bill.

There is nothing in the act, express or implied, attaching any particular force or sanctity to the proceedings of the Tax Commission in assessing the tax. In the absence of any such statutory provision, the courts will not do so, and any defense tending to show the invalidity or illegality of the tax, or the amount actually due, would be admissible. Counsel do not point to any decision of the Missouri courts which would remotely indicate that such a theory would be entertained, and under these circumstances this court will not indulge the assumption that such rule will be adopted by the state courts, especially to afford a basis upon which to adjudge the act unconstitutional.

It should be remembered that the suit or action provided by Article IX, *supra* (Section 12928) is not based on the tax bill, but is to enforce the lien of the state and is a proceeding *in rem*. (Neenan v. St. Joseph, 126 Mo. 89; Charles v. Kelley, 120 Mo. 134; State ex rel. v. Snider, 139 Mo. 549.)

II.

Amici curiae argued in their brief and appellant's counsel asserted on oral argument that the case of State ex rel. Johnson v. Merchants' and Miners' Bank, et al, 279 Mo. 228, holds that the action of the State Board of Equalization in adjusting and equalizing valuations for the assessment of the property, *ad valorem*, taxes is conclusive on the courts in a suit for the collection of the taxes upon all questions except want of jurisdiction in the assessing body and fraud actually entered into.

Those cases were suits upon tax bills for an unpaid balance of property, or ad valorem taxes. The defense pleaded was that the State Board of Equalization had fixed the valuation of the property of defendant bank, and banks generally, at 50 per cent of their actual value while, it had fixed the value of other classes of property at only 10 per cent of actual value. No fraud was charged, that is, it was not alleged that the action of the State Board in making the discrimination against defendant and other banks was fraudulently done, and the evidence adduced on trial went no further than a mere expression of opinion by some individual witnesses that some classes of property, other than that of banks, was valued for property tax purposes at not to exceed 10 per cent of its actual value. The court held that the action of the State Board in equalizing the valuation of all the taxable property of the state of all classes, could not be attacked in this manner. There was no allegation or claim of irregularity in the assessment and no claim that defendant's property had been overvalued. The court said that this character of attack was not available except in direct proceeding, but as a matter of fact the basis of the court's action was that neither the allegations of the petition nor the testimony offered made out a case of discrimination. This is evident from what the court said on page 238.

The statement in the opinion in the Johnson case that an attack on the ground of fraud must be directly by bill in equity, possibly implying that it could not be made by way of defense in a suit on a tax bill, is obiter and is not a correct statement of the law as is shown by the case of State ex rel. v. Trust Co., 261 Mo. 157; State ex rel. v. Cunningham, 153 Mo. 612 and State ex rel. v. Bank, 160 Mo. 610, wherein defenses based upon fraud were entertained in suits on tax bills and proceedings involving the validity of assessments.

Against the unsupported assertion that the only defenses available in a suit on a tax bill are want of jurisdiction and fraud we point to the statement of Judge Valliant in State ex rel. v. Vogelsang, 183 Mo. 117, 1. c. 21, as follows: "The argument that defendant is being deprived of his property without due process of law is without foundation. In the first

place, as we have already said, the tax bills are *prima facie* evidence that the assessor served the notices *on him* that the law requires, and in the next place, in this very suit an opportunity has been afforded him to show that he did not have notice, *and he was afforded the right to make any defense he had against the demand of the state for its taxes.* He was neither forestalled nor prejudiced in his defense. He had his full day in court. He has been deprived of no constitutional right."

The objections made by counsel at the hearing below as to the admission of certain evidence, which was referred to by counsel in the course of the oral argument, were not based upon the theory that the action of the Tax Commission concluded the court, as asserted by counsel, but upon the theory that its action could not be impeached for *discrimination against appellant*, except under allegations of fraud or a state of facts which amount to fraud. As there is no allegation of fraud in the petition the evidence was objected to as beyond the issue.

However, as heretofore pointed out, whatever may be the effect of the action of the State Board of Equalization in adjudging and equalizing valuations for the general property or *ad valorem* taxes no such rule does apply or could apply to the action of the State Tax Commission in assessing the tax under this act.

B.

It should be remembered that the commencement of the proceedings which resulted in the assessment of the tax and the basis for the assessment is a verified statement which the law requires the tax-payer to file with the State Tax Commission. The appellant filed its verified statement and that statement is the basis upon which the assessment of the tax complained of rests. As pointed out in the Kentucky Railroad Tax case (115 U. S. 321, 1. c. 333). "This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert." In assessing the tax against it the Tax Commission accepted its statements of the value and location of its prop-

erty and assets as true, and it would be entirely logical to say that if the Tax Commission did not go beyond its own statements that it is not entitled to any further hearing in the tax proceedings. If the Tax Commission was not satisfied with and did not accept appellant's statements contained in its report, but had found the facts to be otherwise, and assessed its tax on a different basis, a different situation would exist with respect to the right of appellant, to a hearing, but accepting its own statements, as the Tax Commission did in this case, what would be the purpose of any further notice or hearing? What issue would there be to be determined? The only question possible would be as to the construction and application of the law to the facts stated, and the Marquette Hotel Case (State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, etc., 221 S. W. 721), conclusively establishes the right of a tax-payer to question the validity or amount of its taxes as affected by questions of law in direct proceedings in the Supreme Court of the State.

Aside from the provision requiring an ordinary suit to enforce collection appellant has had its hearing, "its day in court" and has not been denied due process of law.

The suggestion of amici curiae that because Section 3 of the act states that the Tax Commission may assess the tax from the facts reported by the taxpayer "and from any fact within or coming to its knowledge" the Commission may disregard the report entirely and assess the entire tax upon mere heresay or rumor is without any foundation in fact. If the Tax Commission does not accept the statements made by the taxpayer in its report then it must proceed under the provisions of Sections 11 and 12 of the act to establish the facts and secure the information upon which to base the assessment.

It may be that while no express provision is made for notice and hearing even under circumstances which might entitle the taxpayer to notice and a hearing, yet as has been frequently stated by this court a liberal construction is given taxing laws in this respect, and as there is no denial of the right to a hearing either expressly or by implication, the Missouri Courts in construing the act may very well hold that the act intended that the taxpayer should have notice if cir-

cumstances arose under which he was entitled to a hearing. Certainly this court will not assume a construction in advance of a construction by the State Courts which make it certain that a taxpayer may be denied due process. It will be time enough for either this court or the Missouri Courts to so declare when the facts in a particular case presents such question.

We think upon the authority of the Kentucky Railroad Tax Case, *supra*, and other cases cited on page 30 of our brief, that the provisions of Section 8 of the act remitting the state to an ordinary suit to recover the tax clearly affords any taxpayer a full and complete hearing on all questions. This is clearly upheld in the Kentucky case, *supra*, wherein it is said: "But whatever relief courts of justice may afford against the injuries apprehended, when in fact they have resulted, is secured to the plaintiffs in error by the very statute of which they complain. For the valuation of railroad property under that act, and the assessment of the taxes thereon, are not final, in the sense that they constitute a charge upon the property subject to the tax, or a liability fixed upon the corporation owning it. That result can be attained, and the tax actually collected, only by suit, as provided in the fifth section of the Statute, either against the officers of the companies for penalties incurred by a failure to pay the taxes levied, or for the recovery of the taxes themselves, by action in the Franklin Circuit Court, or in the courts having jurisdiction in the counties, for the taxes payable to them respectively. The case is thus brought directly and distinctly within the decision in *Davidson v. New Orleans*, 96 U. S. 97, 101, where it was held "that, whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole state, or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law however obnoxious it may be to other objections."

The effect of a provision providing a suit at law as the only means for the collection of a tax is so clearly illustrated by the facts involved and what is said in the opinion in the case of *Myers v. Shields*, 61 Fed. 713, 1. c. 721, that we call attention to that case in addition to those we have cited in our original brief.

C.

Amici curiae refers repeatedly to the severity of the penalties imposed for failure to pay the tax when due.

We call attention to the fact that so far as this case is concerned appellant did not complain of the penalties in its petition nor has it made them the basis of any assignment of error. As we understand the contention, neither *amici curiae* in their brief, nor appellants in oral argument, insist that the validity of the penalties within themselves is before the court for determination, but they refer to their severity as having some indirect bearing on the question of due process.

The penalties themselves not being in question, we have not discussed their validity nor have *amici curiae* or appellant's counsel, as it has been the general rule of this court that in proceedings of this character the court will not determine the validity of the penalties but will await a case in which they are brought directly in issue by an effort to enforce them.

The situation in the present suit appears to be similar in all respects to that before this court in *Southwestern Oil Company v. Texas*, 217 U. S., wherein it is said: "No element of due process of law seems to be wanting unless it be, as contended by the Oil Company, that the penalties prescribed for failing to make the 'reports' required by the statute are so severe and exacting as to make it unsafe for the taxpayer to question the validity of such penalties and thereby interfere with or suspend the collection of the taxes by insisting that they have been imposed in disregard of due process of law. But this point, as to the severity and exacting character of the penalties, need not be now considered, because no penalties are claimed by the State in this action and no judgment therefor was rendered. Besides, the provision as to penalties is not so necessarily connected with the other parts of the statute as to vitiate the entire act, even if that provision should be

held to be void. The right of the State, by a civil suit, to recover the taxes imposed is wholly independent of its right, by suit or prosecution, to recover the prescribed penalties. If the provisions as to penalties should be stricken down, there will still be left a complete act providing for the collection by a civil suit of the taxes due the state. The rule is well settled that if one part of a statute is valid and another invalid the former may be enforced, if it be not so connected with or dependent on the other as to make it clear that the legislature would not have passed that part without the part that may be deemed invalid."

To the same effect are the Ohio Tax Cases, 232 U. S. 576, L. c. 694.

Furthermore, the provisions of statutes imposing penalties to coerce the payment of taxes are regarded as separable from the remainder of the act and are not so connected with or dependent on the remainder of the statute as to make it clear that the legislature would not have passed the remaining part without the penalties which are deemed invalid and the invalidity or illegality of the penalties would not, therefore, be grounds for adjudging the entire act invalid. (Regan v. Farmers' Loan & Trust Co., 154 U. S. 362, L. c. 395; Wilcox v. Consolidated Gas Co., 212 U. S. 19, L. c. 53 and 51; Flint v. Stone Tracy Co., 220 U. S. 108, L. c. 177; Western Union Telegraph Co. v. Richards, 221 U. S. 160, L. c. 172; Minnesota Rate cases, 230 U. S. 352, L. c. 380; Grand Trunk Railway Co. v. Michigan Ry. Com., 231 U. S. 457, L. c. 473; Grenada Lumber Co. v. Mississippi, 217 U. S. 433-443.)

POINT II.

It is difficult to determine the exact theory followed by amici curiae under point two of their brief. In one sentence they assert, in agreement with appellant's counsel, that section 1 of the act is clear and unequivocal and in the next they assert that the court must hold that so-called third clause of section 1 is of no effect because it is meaningless and cannot be made to effect the second clause.

No amount of specious reasoning or theorizing can divorce the so-called third clause from the second clause. The argu-

ment of *amici curiae* as to the meaning and effect of the term "employed in this state" must fail because it overlooks the plain fact that the meaning of that phrase as used in the act is given a legislative determination by the third clause, that is, the term "employed in this state" means "that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located," as therein stated.

Certainly the second and third clauses must be read together, because the meaning of one depends upon the other, and when read together, they clearly disclose the legislative intent to impose the tax upon that portion of the capital stock and surplus of corporations organized under the laws of Missouri, employing a part of their capital stock and surplus in other states, which is employed in this state, and prescribe the formula or rule of computation by which the amount or proportion of the capital stock and surplus employed in this state is apportioned or determined.

It is quite apparent that unless the second clause means and includes both capital stock and surplus that the third clause is meaningless and useless, because a formula or rule for computing the amount of the capital stock and surplus employed in the state is valueless in determining the amount of *capital stock only* employed in the state, and the effect of the construction upon which *amici curiae* insists is to leave the act entirely without any formula or rule of computation for determining the amount of *capital stock only* employed in the state. If the third clause is to have any effect or accomplish any purpose the second clause must be construed to apply to and mean both capital stock and surplus.

The intention of the legislature being apparent from the language, the context and the general purpose of the act, we suggest that as a practical theory, it is much more likely in accordance with the actual facts that the legislature, by mistake and inadvertence, omitted from the second clause of the act the two words "and surplus" than that by any sort of mistake, clerical or otherwise, it unintentionally inserted the entire third clause.

The authorities cited, on page 26 of our original brief, clearly state the general rule, which is, that in the construction of statutes, taxing laws as well as all others, the primary consideration is to ascertain the legislative intent from the language used, from the context and from the general purposes of the act and to give effect to that intention even if it is necessary to supply or omit words and phrases to do so. We think the situation here clearly brings this case within that rule and that it is especially applicable here because the alternative to supplying the omitted words in clause two is to ignore and read out of the law all of clause three.

The assertion of *amici curiae* that the State Tax Commission taxed appellant "on the basis of their gross assets located in the State of Missouri, irrespective of whether or not any of such assets were employed in business in the State of Missouri," is without support. As pointed out in our original brief, the Tax Commission arrived at the amount of the capital stock and surplus apportionable to the state of Missouri by the formula prescribed by clause three of section 1. A mere matter of making the computation from the figures states in appellant's report (p. 135 of the Abstract), clearly demonstrated this.

For these further reasons we respectfully urge the affirmance of the decree of the district court.

JESSE W. BARRETT,

Attorney-General of Missouri,

MERRILL E. OTIS,

Assistant Attorney-General of
Missouri,

FRANK W. McALLISTER,

Solicitors for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Appellant,

vs.

LORENZO D. THOMPSON, State Treasurer of
the State of Missouri, and JESSE W. BARRETT,
Attorney General of the State of Missouri,
Appellees.

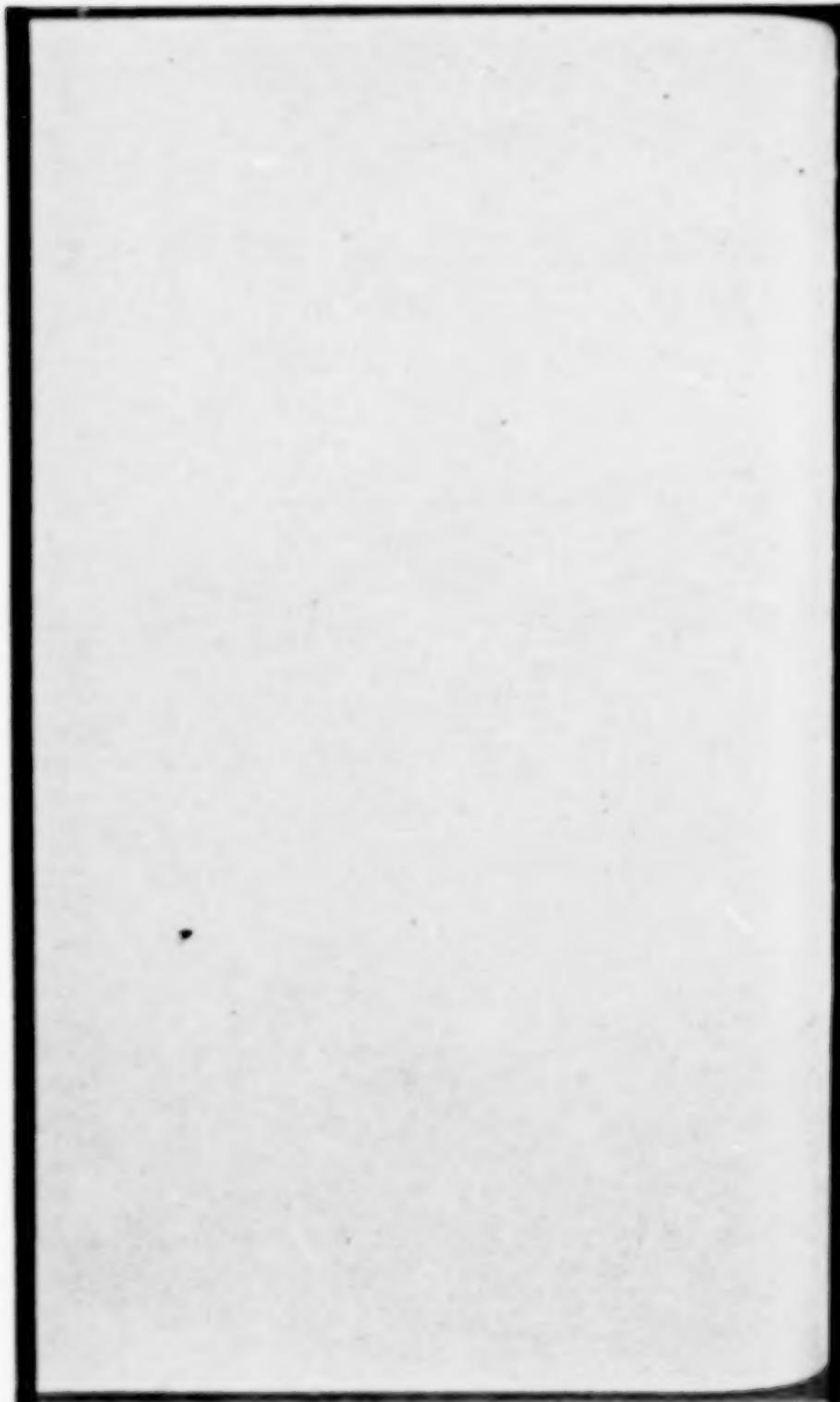
No. 636.

*Appeal from the District Court of the United States,
Central Division of the Western District of Missouri.*

REPLY BRIEF OF APPELLANT.

EDWARD T. MILLER,
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WILLIAM F. EVANS,
Of Counsel.



SUPREME COURT OF THE UNITED STATES

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ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
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LORENZO D. THOMPSON, State Treasurer of
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Appellees.

No. 636.

*Appeal from the District Court of the United States,
Central Division of the Western District of Missouri.*

REPLY BRIEF OF APPELLANT.

STATEMENT.

Upon showing made this court by counsel of the Southwestern Bell Telephone Company and others that said Telephone Company had a cause pending in the District Court of the United States for the Central Division of the Western District of Missouri attacking the constitutionality and validity of the Missouri Franchise Act of 1917, said counsel, on request, as *amici curiae* were permitted to file brief in this case.

Since the filing of that brief and the argument of this case the said case of the Southwestern Bell Telephone Company has been decided by three judges, as provided by the Judicial Code, the said Franchise Act held unconstitutional and an injunctive relief granted.

We have presented later in this brief a certified copy of the opinion of the court in that case, wherein may be seen the grounds upon which the court determined said Franchise Act unconstitutional and invalid.

It is said by counsel for appellee in their reply brief that it is "the contention of *amici curiae* and appellant's counsel that courts are precluded by the action of the State Board of Equalization on all questions except want of jurisdiction and fraud in a suit on the property tax bill." Seemingly, conceding such to be the law, counsel for appellee ardously attempt to escape its conclusive effect in this case as well as the ruling in the case of *State ex rel. Johnson v. Merchants' & Miners' Bank*, 279 Mo. 228.

I.

THE TAXING COMMISSION PROVIDED FOR IN THE MISSOURI PRO-FRANCHISE ACT OF 1917 IN MAKING THE ASSESSMENTS, PROVISION FOR WHICH IS THEREIN MADE, ACTS JUDICIALLY.

There is not the slightest suggestion in the brief of counsel for appellee that said Taxing Commission does not act judicially. It determines the amount of tax by it assessed "from facts reported and from any facts within or coming to its knowledge." (Franchise Tax Act of 1917, Section 3); it has the power to summon witnesses and take testimony in an *ex parte* investigation of facts bearing upon any particular assessment. (Section 11, Franchise Tax Act, 1917.) The said Tax Commission assesses a franchise tax for general revenue purposes, while the Board of Equalization has to do with the assessing of *ad valorem* taxes for general revenue purposes. In the enforced collection of either tax, suit must be instituted in a court of competent jurisdiction and a tax bill is the basis of such action. It is not a question of form of suit, venue of action, chapter of statute, or particular kind of revenue. The question is, has the tax payer been afforded due process of law? As stated, the function of the Board of Equalization in assessing the general property tax was judicial, and its assessment is a judgment; the function of the State

Tax Commission in assessing the Franchise Tax for general revenue purposes is judicial, and its assessment is a judgment. The former judgment is rendered upon a statute providing for notice; the latter is not; under the former there is due process of law; under the latter due process of law is denied. This, because upon suit, said judgments are not subject to collateral attack, as is evidenced in the Johnson case (279 Mo. 228), which makes no distinction between judgments for general property taxes and judgments for franchise taxes, both of which are for general revenue and must be treated without distinction under the laws of the State of Missouri.

Appellees state (page 5, reply brief) that a vital distinction exists between the judgments of the State Board of Equalization in respect of property taxes and judgments of the State Tax Commission in respect of franchise taxes, the difference being that the State Board of Equalization's finding as to the valuation of each class of property in any county must sustain a certain relation to the valuation of the same class of property in all other counties, while the State Tax Commission's finding as to valuation for franchise taxes as to any one taxpayer is not dependent upon valuations as to any other taxpayer. Appellees then state that "in this particular and for this reason, the courts have said that its (State Board of Equalization) judgment as to the equalization of values cannot be attacked collaterally but only directly for fraud." No cases are cited to this effect, nor has appellant been able to find any such distinction in the decisions of the Missouri Courts for the very manifest reason that in neither logic nor law is there ground therefor. If either the judgment of the Board of Equalization or of said Tax Commission upon suit were open to all possible defenses, taxes could be assessed by courts rather than by the taxing tribunals established by statute, and the collection of general taxes would be thrown into the whirlpool of unending litigation; the taxing power of the state crippled and the agencies of the Government hampered by uncertainty in revenues.

Appellees further state (Reply Brief, page 4) that "The Act of 1917 purports to provide a complete scheme for the levy, assessment and collection of the corporation franchise or excise tax." And on page 5 of their reply brief it is further stated that, "it is clearly apparent that none of the provisions of Chapter 119 *supra* (Missouri

Statutes of 1919) apply to the assessment or collection of any taxes except general property taxes of the State." It, however, must be conceded that the purposes and objects are the same, namely, the assessment and collection of taxes for general revenue. No reason or authority is given for any distinction in the application of well established rules of law, recognized in the State of Missouri for over a half century in the application and enforcement of her tax laws.

It is further contended (Reply Brief of Appellee, page 7) that the ruling in the Johnson case, *supra*, that "an attack on the ground of fraud must be directly by bill in equity, possibly implying that it could not be made by way of defense in a suit on a tax bill is *obiter* and is not a correct statement of the law as shown by the cases of *State ex rel. v. Trust Company*, 261 Mo. 457 (448); *State ex rel. v. Cunningham*, 153 Mo. 642, and *State ex rel. v. Bank*, 160 Mo. 640."

The decisions of the Supreme Court of Missouri are fairly consistent and distinguishable when considered in the light of certain rules of law firmly established in that jurisdiction.

II.

WHERE A TAX IS FIXED BY AN ASSESSING BOARD, THE COURTS EITHER OF COMMON LAW OR EQUITY, ARE POWERLESS TO GIVE RELIEF AGAINST AN ERRONEOUS JUDGMENT OF THE ASSESSING BODY AND THE AUTHORITY OF THE COURTS IS LIMITED TO ATTACKS ON THE JUDGMENTS OF SUCH BOARDS OR COMMISSIONS AS ARISE FOR WANT OF JURISDICTION OR FRAUD.

The judgments of assessing boards or commissions under the law of the State of Missouri are not subject to collateral attack, except for want or excess of jurisdiction or fraud. All matters of merely excessive or unequal assessment must be reached by the taxpayer in a hearing before the assessing tribunal; hence, the necessity under the law of the State of Missouri of a notice and hearing in pursuance thereof, to the end that the taxpayer may not be deprived of property without due process of law.

State ex rel. v. Johnson, 279 Mo. 228, and cases therein cited.

State ex rel. v. Bank of Neosho, 120 Mo. 161, 175.

Cooley on Taxation (2nd Ed.), 748, 749, 750.

State ex rel. v. Duncan, 265 Mo. 353, 1. c. 368, 370.

State ex rel. Stone, Collector, v. Christian County Bank, 234 Mo. 194, l. c. 197, 199.
Hamilton v. Rosenblatt, 8 Mo. App., 237, l. c. 241, 242.
National Bank of Unionville v. Stotts, Collector, 155 Mo. 55.

The cases cited by appellees in their reply brief in no sense contradict the proposition above enunciated and are clearly distinguishable from the cases above cited.

In *State ex rel., Collector City of St. Louis, Mo., v. Title Guaranty Company*, 261 Mo. 448, cited by appellees, the evidence disclosed that the Board of Equalization upon hearing added to the total of the original assessment list returned by the defendant therein, property which it, defendant, did not own. Suit was instituted for the taxes and a defense was made that the defendant did not own certain property assessed and that the Board of Equalization acted without or in excess of its jurisdiction in so increasing the assessment. The Supreme Court of Missouri in considering that issue held, as contended by the taxpayer, that the Board of Equalization did act without or in excess of its jurisdiction, and for that reason the defense was allowed.

It, therefore, clearly appears that the case falls within the rule above enunciated that the judgments of assessing boards, as the Board of Equalization, may be attacked in a suit to enforce the collection of taxes, for want of jurisdiction or for an attempt to exercise jurisdiction in excess of its authority.

State ex rel. v. Cunningham, 153 Mo. 642, and relied on by appellees, was a suit on a personal tax bill against defendant therein. The answer plead that the defendant's personal property was regularly assessed and the assessment duly returned by the county assessor, but that the Board of Equalization with intent to perpetrate a fraud on defendant added to the list of property given by him and returned by the assessor, certain property which materially swelled his assessment and in order to conceal their real act falsified its record so as to not show additions to the property returned by the assessor, but to make it appear as increased values of the property returned by the assessor. Upon consideration, the Supreme Court of Missouri held that the action of the Board of Equalization was a fraud

on the rights of the taxpayer and by reason of that fraud he was entitled to the relief by him prayed.

Here again, it appears that the action of the Supreme Court of Missouri in going behind the assessment of the Board of Equalization was on the ground of fraud, which ruling is in harmony with the authorities hereinabove cited and relied upon by the appellant.

In the case of *State ex rel. v. Bank*, 160 Mo. 640, an action was instituted by the collector to recover certain personal taxes. In the suit it was sought to hold defendant bank for assessments upon bank stock owned by certain stockholders. The assessment was made against the bank, when under the law, as then existing, it should have been made against the stockholders. The court in considering the case found that the assessing board had acted without jurisdiction and had included property in the assessment against the taxpayer not authorized by law and for that reason permitted the defense to be made by the taxpayer. The defense, however, was limited to the acts of the board in excess of its jurisdiction.

The facts in the case of *State v. Vogelsang*, 183 Mo. 17, briefly, were that the collector of revenue of the City of St. Louis had instituted suit against a taxpayer for certain back taxes omitted from the current assessments of the years in question, which were not as a matter of fact discovered until several years after the date upon which the assessments should have been made. The defense asserted by the taxpayer was that he had been deprived of due process of law in that he had been given no notice of the assessment which had been made as aforesaid. In the trial it was shown by the records of the assessor that notice had been given him, which fact was not directly denied, and the court found as an issue of fact that such notice had been given and that such jurisdictional step had been had. It, therefore, is seen that the question at issue was one of jurisdiction and that the finding of the court was adversely to the contention of the taxpayer upon that issue of fact. And the language used by the court and quoted in appellees' reply brief had to do with the issue of jurisdiction only, and it must be read in the light of and in reference to that issue.

The case of *State ex rel. Marquette Hotel Investment Company v. State Tax Commission et al.*, 221 S. W. 721, reached the Supreme Court of Missouri on a writ of

certiorari. Such writ is a proper remedy to quash records and proceedings of judicial tribunals of limited or restricted jurisdiction where it appears upon the face of the record that such tribunals have acted without rightful jurisdiction.

State ex rel. v. Board of Equalization, 256 Mo., l. c. 461.

State ex rel. v. Bank, 279 Mo. 228, 236.

Therefore, under the writ of certiorari issued in the Marquette Hotel Investment Company case, the Supreme Court of Missouri under its uniform practice was restricted in its consideration of that case to the face of the record. Only one point was urged and that was the meaning of the word "surplus," and the court construed the meaning of that word in the Franchise Act of 1917 upon the face of the record of that case and apparently with the consent of counsel for all parties at interest.

III.

THERE IS NO PROVISION FOR A HEARING ON THE PART OF A TAXPAYER UNDER THE FRANCHISE ACT OF 1917, AND THE FIGURES SUBMITTED BY THE APPELLANT IN ITS REPORT TO THE TAX COMMISSION IN FACT WERE NOT ADOPTED BY THE TAX COMMISSION AS REPORTED.

The report to the Tax Commission made by the appellant shows no surplus; the Tax Commission found a surplus of \$101,000,000 (Record 135, 58).

It is fair to say, however, that appellees make no contention that the Tax Commission is limited in its finding to the report of the taxpayer. They concede that there is no express provision in the Act for notice to the taxpayer of hearing before said Tax Commission (Reply Brief, page 9). Yet, apparently, they would have this court read a provision therefor into said Act, notwithstanding this court has held that notice must be "provided for by the statute" and that notice "must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor and grace."

Security Trust Company v. Lexington, 203 U. S. 323, 333.

Central Georgia R. R. Co. v. Wright, 207 U. S. 127, 138.

Coe v. Armour Fert. Works, 237 U. S. 413.

Particularly, is the contention of appellees untenable in a tax proceeding where the taxing Act must be strictly construed.

See authorities, appellant's original brief, pages 21-27; brief *amici curiae*, pages 47-69.

The rules of law applicable to proceedings for the assessment of taxes for general revenue purposes and for taxes arising under special assessments for specific improvements are somewhat different, in that under special assessments for specific improvements it is the presumption of law that benefits are derived by the taxpayer equivalent to his outlay in taxes.

However, notwithstanding that distinction, in the cases referred to in appellee's reply brief, pages 10, 11 and 12, and in the cases cited by appellees in their original brief, pages 29 to 33, inclusive, it will be found in each and all of them, either that provision is made for a hearing before the assessing board or commission or that the statutory law of the jurisdiction specifically provides that in a suit upon the tax bill all defenses of the taxpayer may be asserted. These provisions clearly and definitely distinguish each and all of said cases from the instant case before this court, and evidences all the more clearly that under the Missouri Franchise Act of 1917 the taxpayer is deprived of due process of law.

IV.

THE MISSOURI FRANCHISE ACT OF 1917 IMPOSES A TAX OF THREE-FORTIETHS ($3/40$) OF ONE PER CENT OF THE PAR VALUE OF THE OUTSTANDING CAPITAL STOCK OF BOTH DOMESTIC AND FOREIGN CORPORATIONS, BUT IMPOSES A TAX OF \$25 ONLY ON CORPORATIONS WHETHER DOMESTIC OR FOREIGN HAVING NO CAPITAL STOCK, BY REASON WHEREOF SAID ACT IS UNCONSTITUTIONAL AND VOID BECAUSE IT VIOLATES SECTION 1 OF ARTICLE XIV OF AMENDMENTS TO CONSTITUTION OF THE UNITED STATES.

In appellant's bill of complaint it alleges that said Missouri Franchise Tax Act is unconstitutional and void and violates Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that said Act seeks to impose a tax of three-fortieths ($3/40$) of one per cent of the par value of the outstanding capital stock of both domestic and foreign corporations, but that said provision does not apply to corporations whether domestic or foreign having no capital stock although having all the

rights and privileges of doing business in the State of Missouri given to corporations having capital stock. (Record page 8, and Subdivisions 2 and 3 of paragraph 10 of Bill of Complaint.)

And by subdivision (e), paragraph 12 of assignment of errors (Record, page 42), error is assigned of the judgment of the court in that said Missouri Franchise Act attempts to exempt "domestic corporations having no capital stock doing business in this state and foreign corporations having no capital stock and doing business in this state."

In the opinion of the district court in the case of *Southwestern Bell Telephone Co., a corporation, v. George H. Middlekamp, State Treasurer, et al.*, mentioned above, decided March 9, 1921, it is stated that the point here presented was urged in the case at bar before the same judges who sat in the Southwestern Bell Telephone Company case, but at that time there had been no adjudication by the Supreme Court of Missouri that a foreign corporation with stock without a stated par value could qualify to do business in the state of Missouri, but that since that date and prior to the decision of the court in Southwestern Bell Telephone Company case the Supreme Court of Missouri had definitely held that corporations having no capital stock or having no stated par value could qualify to do business in the state of Missouri. *State ex rel. Standard Tank Car Co. v. Sullivan*, 221 S. W. 728. And one of the arguments used by the Supreme Court of the state of Missouri in arriving at that conclusion was the provision of Section 6 of the Franchise Tax law in question.

Therefore, it is now the declared law of the state of Missouri that foreign corporations with no capital stock or without a stated par value of its stock can qualify to do business in Missouri and under the Franchise Act of 1917 will be obligated to pay a franchise tax of \$25 only. While corporations, such as the appellant in this case, engaged in the same line of business, by the terms of said law are required to pay a tax of many thousands of dollars annually. Clearly such demonstrates that the Act is discriminatory and provides for inequality of burdens of taxation and is violative of the constitutional provisions above mentioned.

We here print in full a certified copy of the opinion of the court in said Southwestern Bell Telephone Company case and urge it and the authorities therein cited in aid of the appellant's contention in this case.

In the District Court of the United States for the Central Division of the Western District of Missouri,
Southwestern Bell Telephone Company, a corporation, Plaintiff,

vs.

George H. Middlekamp, State Treasurer of Missouri, and Frank W. McAllister, Attorney General of the State of Missouri, Defendants.

Before Stone, Circuit Judge, and Van Valkenburgh and Wade, District Judges.

Per Curiam.

Plaintiff's amended bill of complaint challenges the validity of the Franchise Tax Law enacted by the General Assembly of the state of Missouri, Session Laws, 1917, p. 237.

In the case of the *St. Louis & San Francisco Railroad Company* vs. *George H. Middlekamp, State Treasurer, et al.*, — Fed. —, this court, the present judges sitting, considered numerous objections presented by the plaintiff in that case, and sustained the law.

One of the points urged was that the law is void because in conflict with the provisions of the Constitution of the United States and the Constitution of the state of Missouri, which guarantee to all persons equal protection of the laws, because of the provision that corporations "having no capital stock" shall pay "a fee of twenty-five dollars," while corporations organized with capital stock are, under the provisions of the Act, required to pay a tax based upon their "outstanding capital stock and surplus."

The same question is again presented in the case at bar. Upon the hearing in the *St. Louis & San Francisco* case, when this question was reached for discussion, counsel for the defendants insisted that inasmuch as under the law of Missouri a corporation without capital stock could not be created, and that a corporation organized outside of the state of Missouri without capital stock could not be per-

nitted to transact business within the state of Missouri, the question was purely academic.

The contention that a corporation without capital stock could not be created under the laws of Missouri was not disputed; nor was there serious contention, at that time, that a corporation organized without the state of Missouri without capital stock could be permitted to transact business in the state of Missouri.

Now, however, we are confronted with the opinion of the Supreme Court of Missouri, in *State ex rel. Standard Tank Car Company v. Sullivan*, 221 S. W. Rep. 728, which holds "that a nonresident corporation organized without capital stock has the right to transact business within the state of Missouri;" and it is further pointed out by the court that corporations of that character, "have been admitted."

The opinion of the court also clears up any possible doubt of the construction which must be placed upon the words "corporations having no capital stock," as used in the Franchise Tax Law. The court says:

"We think of no reason why the state should desire to exclude from its borders companies organized in other states, and having those species of stock, merely because companies similarly situated cannot be organized here. Instead, legislation has occurred in recognition of the possibility of corporations having no capital stock, and organized for profit in another state being admitted to this state, and of the fact that they have been admitted. In the Act laying a franchise tax on corporations generally, foreign corporations without a capital stock are required to report to the taxing authorities regarding their business, in such manner as may be prescribed, and a lump annual tax is laid upon them (Session Laws 1917, p. 237, Sections 4, 5 and 6).

Our statutes make no provision for the formation of such companies, except certain classes of mutual insurance companies, and possibly a few others, although the mutual insurance companies are all we call to mind (R. S. 1909, 661, Articles 10, 11 and 12).

But Section 6 of the Franchise Tax Law includes among foreign corporations having no capital stock upon which a franchise tax may be laid, not only

mutual and other insurance companies "organizable under our statutes, but any other foreign corporation organized for profit and without a capital stock."

Under our duty to accept the construction of state statutes by the Supreme Court of the state it is, therefore, settled:

1. That corporations organized with shares, without a par value, under the law of some other state have the legal right to be admitted to transact business within the state of Missouri.

2. That the words "Any other corporation . . . having no capital stock," in the Franchise Tax Law specifically refers to corporations organized with shares without a par value.

The court judicially knows that much of the business of the country, in the present day, is done by corporations not having par value capital stock. They are not limited to any particular business, and there is nothing in the method of transacting the business that differs from the method employed by the ordinary corporations.

Being admitted to transact business in the state of Missouri, there is nothing in the law which limits their power, as compared with any other corporation.

The Supreme Court of Missouri, in *State v. Sullivan, supra*, quotes from *State ex rel. Brown Contracting and Building Company v. Cook*, 181 Mo. 596, 89 S. W. 929:

"Looking to our statutory provisions for the public policy of the state, it will be readily observed that we have adopted the most liberal comity towards corporations organized under the laws of other states and countries. Indeed, we have placed them upon substantially the same footing as our own domestic corporate bodies, and given them the same powers and subjected them to the same obligations that are provided for like corporations in this state."

From the foregoing it must be apparent that an ordinary corporation with capital stock must pay a franchise tax based upon "three-tenths of one per cent" of certain values defined in the statute; while a corporation, without capital stock, doing business in Missouri, is only required to pay a fee of twenty-five dollars.

A telephone company, organized in some other state, without capital stock, but transacting as much business and using as much capital as does the plaintiff, would, under the provisions of the Act, pay twenty-five dollars, while the facts in this case show that the plaintiff is assessed approximately fifty three thousand dollars.

Is a law which permits such discrimination in taxing the franchises of corporations valid?

It is the contention of counsel for the defendants that the state has the power to classify property for the purpose of taxation. That must be conceded. In the opinion of this court in the St. Louis and San Francisco case, *suijra*, this language was used:

"Of course, upon the same line of business substantial equality is required; while a state might impose a tax upon a pool hall it could not arbitrarily impose a higher tax upon one pool hall than another. * * * Taxation is equal when the tax is substantially the same upon all persons or corporations engaged in the same line of business."

In that case, for the reasons heretofore stated, the court did not specifically determine the point in issue with reference to the question here discussed.

The court assumed that the law would not be invalidated by some provision which could, in no event, ever become effective because of the absence of corporations not having capital stock, but here the question is squarely presented, and it must be determined whether or not the classification adopted violates constitutional rights.

It is well settled that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Royster Gano Company v. Virginia*, — U. S. —, 64 Law Ed. 658. Decided June 7, 1920.)

"Equal protection is denied when upon one of the two parties engaged in the same kind of business and under the same conditions burdens are cast, which are not cast upon the other."

(*Cotting v. Kansas City Stock Yards*, 183 U. S. 79, 112, 22 Sup. Ct. 30, 46 L. Ed. 92.)

The Court of Appeals, in this circuit, in *Chicago, M. & St. P. R. Co. v. Westby*, 178 Fed. 619, says:

"The Fourteenth Amendment to the Constitution of the United States forbids any state to 'deny to any person within its jurisdiction the equal protection of the laws.' How may such legislation escape this inhibition? The answer is by classification, and the concession is freely made that the legislature of the states may lawfully classify the subjects of their laws and make provisions applicable to one class of subjects that have no application to another class. But the members of these classes may not be selected arbitrarily without just or sound reason inherent in their respective situations and circumstances relative to the subject-matter of the legislation for the difference in the burdens imposed and the privileges conferred upon them by such a discriminatory law."

The Supreme Court of the United States, in *Southern Ry. Co. v. Greene*, 216 U. S. 400, thus expresses it:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that, in all cases, it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and reasonable relation to the attempted classification—and is not a mere arbitrary selection."

The Supreme Court of Missouri has uniformly upheld these well settled rules.

In *State v. Baskowitz*, 250 Mo. 82, it is said:

"The courts have held very uniformly that the state may legislate in regard to a class, but cannot arbitrarily divide that class into two parts, giving to one part a privilege, or subjecting it to restrictions which do not apply to the others in the same class."

In *Sams v. St. Louis & Meramec River Railroad Co.*, 171 Mo. 53, the court said:

"Where there are two concerns engaged in precisely the same business, and both conducting it in precisely

the same manner, a statute which would undertake to impose a liability on the one and not on the other, could not be sustained, in the face of either our state or our federal Constitution."

In *Russell v. Croy*, 164 Mo. 69, it is said:

"We do mean to say the classification must rest on some reason other than mere ownership and that different pieces of property of the same kind, held and used for the same or similar purposes within the same jurisdiction, cannot lawfully be so classified, as that one is subjected to the tax, and the other exempt, merely because one belongs to a natural person and the other to a corporation, or that one is the obligation of a corporation and the other that of a natural person, or one that of a large concern, and the other that of a small one."

A classification must bear a "reasonable and just relation to the things in respect to which such classification is imposed." (*Southern Ry. Co. v. Greene, supra.*)

The subject of taxation here is the franchise, the privilege of doing business in the State of Missouri.

The value of such privilege is approximated as to corporations with capital stock by considering the amount of money (capital stock and surplus) used in the business of the corporation exercising the privilege.

The value of the privilege of doing business in Missouri cannot depend upon the particular form of the capital stock of the corporation, whether with or without a fixed par value.

The classification cannot rest upon the question of "mere ownership," nor "because one belongs to a natural person and the other to a corporation."

Nor can the classification be made to arbitrarily depend upon whether the corporation is organized in the State of Missouri, or in some other state. (*Southern Ry. Co. v. Green, supra.*)

Under the foregoing considerations it must be apparent that the Franchise Law enacted by the General Assembly of the State of Missouri cannot be sustained. It expressly provides for inequality of burdens of taxation, regardless of the character of property owned by the corporations,

the nature of the business or the value of the franchise. Two groups of men, with a million dollars each, might incorporate, one group creating a corporation with capital stock, and the other organizing a corporation without capital stock. Under the Franchise Tax Law these two corporations could transact an equal amount of business, of the same kind, in the State of Missouri. One would be compelled to pay a tax based upon the value of its property; the other a mere fee of twenty-five dollars.

There is, in the mere fact that the stock of one has a par value, and that the stock of the other has not a fixed par value, no such distinction in the nature of the thing which is taxed, as justifies the discrimination. It is discrimination; it is not mere classification.

There is nothing in the nature of the non-capital stock corporation which renders it difficult for the state to impose approximately the same tax upon a corporation without capital stock that is assessed against corporations having capital stock.

In *State v. Sullivan, supra*, the court quotes from *Petroleum Company v. Hopkins*, 105 Kansas 161, 181 Pac. 625, in which the court said:

"The fact that the shares of its stock have no nominal par value is of little consequence. Any prudent charter board in determining whether a foreign corporation is worthy of admission to do business in Kansas will attach but little importance to the nominal value of its shares of stock, even if they have a nominal value."

So there would be no difficulty in ascertaining with reasonable certainty the value of the franchise or privilege used by non-capital stock corporations, measured by the amount of the money used in its business.

The Franchise Tax Law, in the foregoing respect, violating the constitutional requirements that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. * * * Nor deny to any person within its jurisdiction the equal protection of the laws," must be held void.

While the foregoing conclusion renders it unnecessary to decide other questions submitted, the court cannot refrain from expressing the hope that the legislature of Missouri, now in session, will give serious consideration to other ob-

jections urged by counsel, especially the claim that banks and trust companies are favored because they do not include their deposits in the report of their capital stock and surplus.

Whether it was the intention of the legislature that the deposits should be included is very indefinite, and much litigation may be avoided by a more definite expression.

Serious consideration should also be given to the point urged that the Act does not provide for any notice, hearing or review, either before or after the assessment of the tax.

This hearing is upon an application for a temporary injunction. Necessarily these questions will be subject to further consideration upon final hearing. We have been impelled to give the matter more extensive consideration than ordinarily, because of the possibility of legislative action at this time.

A temporary injunction will issue as prayed.

United States of America, Sct.

I, Edwin R. Durham, clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing is a true copy of the opinion in the cause therein named, as fully as the same appears in my office.

Witness my hand as clerk, and the seal of said court. Done at office in Kansas City, Missouri, this 10th day of March, A. D. 1921.

(Seal)

EDWIN R. DURHAM, *Clerk.*
By H. C. SPAULDING, *Deputy Clerk.*

For reasons herein and in our original brief stated, the decree of the lower court should be reversed.

EDWARD T. MILLER,
HENRY S. CONRAD,
Solicitors for Appellant.

WILLIAM F. EVANS,
Of Counsel.



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Office Supreme Court, U. S.

F I L E D

MAR 21 1921

JAMES D. MAYER,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Appellant,
vs.
LARENZO D. THOMPSON, State Treasurer of the State of Missouri, and JESSE W. BARRETT, Attorney-General of the State of Missouri, Appellees.

No. 636

APPELLEE'S BRIEF IN REPLY TO REPLY BRIEF OF APPELLANT.

JESSE W. BARRETT,
Attorney-General of Missouri.
MERRILL E. OTIS,
Assistant Attorney-General,
FRANK W. McALLISTER,
Solicitors for Appellees.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Appellant,
vs.
LARENZO D. THOMPSON, State Treasurer of the State of Missouri, and JESSE W. BARRETT, Attorney-General of the State of Missouri, Appellees.

No. 636

STIPULATION.

Upon request of counsel for Appellees, the Appellants hereby consent to Appellees filing the accompanying brief.

EDWART T. MILLER,
HENRY S. CONRAD,
Solicitors for Appellants.

WILLIAM F. EVANS,
Of Counsel.



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IN THE

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vs.

LARENZO D. THOMPSON, State Treasurer of the State of Missouri, and JESSE W. BARPETT, Attorney-General of the State of Missouri, Appellees.

No. 636

APPELLEE'S BRIEF IN REPLY TO REPLY BRIEF OF APPELLANT.

STATEMENT.

Appellees insist that the objection made in point IV of the reply brief of appellant to the validity of the Missouri Franchise Tax Law is not before the court for consideration in this case.

It may be well to recall that on the day immediately preceding the call of this case for argument, counsel for Southwestern Bell Telephone Company, et al, were given leave to, and filed a brief and argument *amici curiae*. As this brief presented two of the objections to the validity of the law urged by appellant from an entirely different angle and cited many new cases, appellees, at the conclusion of the oral argument asked and were given leave to file a brief in reply to the brief and argument of *amici curiae* within ten days, and appellant was given leave to file a reply thereto.

In the reply brief just filed under that leave, appellant in point IV attempts to raise, for the first time in this case, the objection to the validity of the law, that while corporations with par value capital stock are taxed at the rate of three-fortieths of one per cent of the par value of their capital stock and surplus, under the provisions of Section 1 of the Act, corporations with capital stock without par value and corporations without capital stock engaged in business of the same general character are taxed under the provisions of Section 6 of the Act at a fixed annual fee of \$25.00, and that the law is, therefore, discriminatory and invalid because in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

It is true that appellant alleged in its petition (paragraphs [2] and [3] of division 10, rec. p. 8) that the act is discriminatory and in conflict with Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that, it imposes the tax of three-fortieths of one percent on the par value of the capital stock and surplus of appellant and other corporations with par value capital stock but does not apply to a corporation without capital stock, and that this objection is renewed in the assignment of errors (paragraph 10, assignment of errors, rec. p. 40-41). But nowhere is it alleged or charged that there is any discrimination between corporations with par value capital stock and corporations with capital stock of no par value, or that the latter are exempt from the tax under Section 1 of the Act and subject only to the annual fee of \$25.00 under Section 6 of the Act. The particular objection now relied upon by appellant is made for the first time in this court and in its reply brief filed since argument and submission.

Appellant clearly abandoned its original objection to the law by failing to in any manner present it in this court. It is nowhere mentioned or referred to, directly or indirectly, in appellants brief and argument, nor was it referred to by counsel in the oral argument.

Attempt is made to give force to the objection by the decision of the Supreme Court of Missouri in the case of State ex rel. Standard Tank Car Company v. Sullivan, 221 S. W.

728. In fact, the entire argument in support of the objection is based upon the decision in that case. We call the court's attention to the fact that that opinion was delivered by the Supreme Court of Missouri on April 30, 1920, and had been in the published volumes of the reports of opinions of the Supreme Court of Missouri many months before appellants prepared their brief and argument in this court.

Appellant's eleventh-hour effort to present this objection appears to have been inspired by the opinion of the District Court for the Western District of Missouri in the case of Southwestern Bell Telephone Company v. Thompson, et al, which counsel have set out in full under point IV of their reply brief.

We insist that appellant abandoned its original objection as alleged in its petition and charged in its assignment of error, and that the objection to the validity of the law now urged, is made for the first time in this court and here for the first time in its reply brief filed after oral argument and submission.

We, therefore, insist that the objection to the validity of the law made in point IV of the reply brief of appellant cannot be injected into the case at this late hour and in this manner and that the same is not before the court for determination in this case.

I.

In point IV of their original brief counsel contended that the decision of the Supreme Court of Missouri in the Marquette Hotel Case (State ex rel. Marquette Hotel Investment Company v. State Tax Commission, 221 S. W. 721), was not binding on either the lower court or this court because it had not been decided when this case was argued and submitted in the court below. If appellant's contention there is sound the same should apply to the consideration of the opinion of the Supreme Court of Missouri in the case of State ex rel. Standard Tank Car Company v. Sullivan, 221 S. W. 728, which is appellant's sole reliance in support of its objection, and which was not delivered until after the cause was submitted below.

II.

Appellees insist that the objection to the validity of the law made in point IV of appellant's reply brief is not before the Court for consideration, but if the court does consider the same we desire to submit the following in answer to appellant's argument.

A.

In the opinion of the District Court in Southwestern Bell Telephone Company v. Thompson, etc., et al, printed in full in appellant's reply brief, the District Court assumed that the Supreme Court of Missouri, in the case of State ex rel. Standard Tank Car Company v. Sullivan (221 S. W. 728), held that corporations with capital stock of no par value were identical with corporations with no capital stock. We insist that the Missouri Supreme Court made no such decision in that case, or elsewhere. The District Court based its assumption upon certain language in the opinion in the Standard Tank Car Company case which is quoted, but a reading of the context discloses that the court was not determining the question whether corporations with no capital stock and corporations with capital stock of no par value were identical and no question of that kind was even remotely involved in the decision of the Standard Tank Car Company case. Appellant, on page 9 of its reply brief, refers to the language quoted in the opinion of the district court as "one of the arguments used by the Supreme Court of the State of Missouri" and we think it correctly characterized the language used. It is but an argument of the court to support its conclusion that the policy of the State of Missouri was not against the admission of foreign corporations with capital stock of no par value.

The supreme Court nowhere attempted to hold that, within the purpose and meaning of the Corporation Franchise Tax Act, corporations with no par value capital stock are identical with corporations with no capital stock, much less does it undertake to say that corporations with capital stock of no par value are exempt from the tax imposed under Section 1 of the Act and subject only to the payment of an annual

fee of \$25.00 as provided for certain corporations with no capital stock under the provisions of Section 6 of the Act. Any such question was entirely beyond the issues in the case before the court and anything it said on that subject is mere *obiter*.

Furthermore, the theory that the court intended to say in its opinion that corporations with capital stock of no par value are subject only to the annual fee of \$25.00 under Section 6 of the Act is dispelled by what the court said in paragraph (13) on page 737, in answer to the objection that the complaining company in that case (a corporation with capital stock of no par value), if admitted, could not be taxed under the laws of Missouri, as is evident from the following:

"Neither is the conclusion to be deduced that companies having stock of no par value fixed by charter cannot be assessed and made to pay a just tax to this state if they are admitted here. In dealing with this very objection to the admission into Kansas of a corporation like the relator the Supreme Court of that state held the objection untenable. The decision was given upon a statute for the taxation of foreign corporations which, like ours, based the tax upon the proportion of a company's capital stock employed in the state of Kansas, as will be seen in reading the opinion. *N. A. Petroleum Co. v. Hopkins*, 105 Kan. 161, 181 Pac. 625. The court said:

"The problem of determining the solvency and bona fide capitalization of the plaintiff presents no unusual difficulty. The fact that the shares of its stock have no nominal par value is of little consequence. Any prudent charter board, in determining whether a foreign corporation is worthy of admission to do business in Kansas, would attach little importance to the nominal value of its shares of stock, even if they have a nominal value. As in all other cases, the charter board should concern itself earnestly to ascertain the genuine capital—those assets permanently devoted to the corporate

business as a basis for its business credit, and upon which its hope of profits is rationally founded.

"The 'lawful issued capital' and the 'capital stock' of such corporations are the assets that it devotes to the prosecution of its business. When the value of those assets is ascertained, the fee required to be paid by law can be based on that portion of the assets which the corporation proposes to 'invest and use in the exercise and enjoyment of its corporate privileges within this state.' " 105 Kan. 165, 181 Pac. loc. cit. 627.

We think the view of the matter taken by the Supreme Court of Kansas is sound, and that the tax officials of this state will have no unusual difficulty in determining what taxes ought to be paid by relator and similar corporations if licensed to come into the state".

Certainly the court could not have understood that the complaining company and other corporations with capital stock without par value, if admitted to do business in Missouri, would not be subject to the tax, but would only be required to pay a \$25.00 annual fee, because if subject only to the \$25.00 annual fee no sort of difficulty would be involved in determining the tax. In fact there would be nothing for the tax officials to determine. Evidently the court had in mind the application of Section 1 of the Corporation Franchise Tax Act to corporations of the character of the complaining company in that case, if they were admitted to do business in Missouri.

The language of Section 1 clearly imposes the tax of three-fortieths of one per cent upon all corporations, whether foreign or domestic, except those specifically mentioned, to-wit: Corporations not organized for profit, express companies, which now pay an annual tax on their gross receipts, and insurance companies, which pay an annual tax on their gross premium receipts. Can it be said that a corporation which would engage in a competitive business with appellant, a railroad corporation, or any business or manufacturing corporation, is "not organized for profit" whether it has par value

capital stock or capital stock without par value. It is too clear for argument that Section 1 imposes the tax upon all corporations which are organized for profit (except express companies and insurance companies), and makes no distinction between corporations organized with par value capital stock and corporations with capital stock of no par value. Certainly if they are organized for profit, they are not exempted from the tax by Section 1 because they have capital stock with no par value, or have no capital stock.

The only other sections of the law which have any bearing on this question are sections 4 and 6. By Section 4 provision is made for a different form of report by corporations "having no capital stock." By Section 6 an annual fee (not a tax, but a fee), is imposed on the corporations referred to in Section 4. By their express terms Section 4 and Section 6 apply only to corporations with no capital stock and as it is clear that Section 1 does not exempt corporations organized for profit with capital stock of no par value it is equally clear that the language of Sections 4 and 6 does not include or apply to such corporations.

Taking a view of the entire act, it is evident that Sections 4, 5 and 6 were intended to apply only to corporations that are not included within the provisions of Section 1 and it does not, in any sense, create an exception to Section 1, and imposes a different kind of a charge altogether. It is not a tax but *an annual fee*.

It is a fair conclusion that Section 6, when considered in connection with the corporation laws of the state, applies only to certain classes of insurance companies. No other character of corporation is specifically mentioned and the expression "or any other corporation not organized strictly for religious, charitable or educational purposes and having no capital stock" clearly indicates that it refers only to corporations of a similar nature. A fair construction of the language would limit the words "or any other corporation not organized strictly for religious, charitable or educational purposes," to corporations organized for purposes somewhat akin to, or in the nature of, "religious, charitable or educational purposes" and excludes the idea of applying the section to a business or

manufacturing corporation organized for profit. It may very well be held to have no application to any corporation not organized for profit and to apply only to that class of insurance companies which do not collect regular premiums and are not, therefore, within the exemption of insurance companies in Section 1, and are not strictly religious, charitable or educational.

In fact, color is given to this construction by a sentence in the quotation from the opinion of the Supreme Court of Missouri in the opinion of the District Court in the Southwestern Bell Telephone Company case as follows: "Our statutes make no provision for the formation of such companies, except certain classes of mutual insurance companies, and possibly a few others, although the mutual insurance companies are all we call to mind."

We insist that the Supreme Court of Missouri has not determined, directly or indirectly, that corporations with capital stock of no par value are identical with corporations of no capital stock and we insist that the language quoted in the opinion of the District Court from the opinion of the Supreme Court of Missouri in the Standard Tank Car Company case is not an authoritative decision by the Supreme Court of Missouri that business and manufacturing corporations, or any corporation organized for profit, is exempt from the tax provided by Section 1 of the Corporation Franchise Tax Act and that it is only subject to the payment of the annual fee provided by Section 6 of the Act.

It is not probable that the Supreme Court of Missouri would adopt a construction of the Corporation Franchise Tax Act, the result of which would be the destruction of the entire law, without full and careful consideration, and loose expressions used merely as argument in a case in which the construction of the Act was not even remotely involved should not be accepted as the settled construction of the law by the Missouri Court, especially when such construction is attended by the fatal consequences which follow here.

The court is not advised as to the issues presented in the Southwestern Bell Telephone Company case, nor as to the allegation upon which the decision of that court rests. The

case has proceeded no further than the application for a temporary injunction. The case has not been tried on its merits and facts presented upon final hearing may change the view of the District Court as to this and other objections to the validity of the law.

The courts always prefer that construction of the law which makes for its validity and it is the settled rule of this court "to wait until the state court has adopted a construction of the statute under attack rather than to assume in advance that a construction will be adopted such as to render the law obnoxious to the Federal Constitution."

Plymouth Coal Company v. Pennsylvania, 232 U. S. 531;

Arizona Employers Liability Cases, 250 U. S. 400, l. c. 430;

Mountain Timber Company v. Washington, 243 U. S. 219, l. c. 246;

St. Louis S. W. Ry. Co. v. Arkansas, 235 U. S. 350, l. c. 369.

B.

The only classification attempted by Section 1 of the Act is to exempt from the tax as separate classes, (a) all corporations not organized for profit; (b) express companies which now pay an annual tax on their gross receipts; and (c) insurance companies which pay an annual tax on their gross premium receipts.

For many years express companies have been in a separate class for the purposes of taxation in Missouri (Sec. 13053, R. S. 1919, Vol. III, p. 4077), and that classification has been upheld by this court in *Pacific Express Company v. Seibert*, 142 U. S. 339.

Insurance companies have also for many years been in a separate class for the purposes of taxation in Missouri (Section 6387, R. S. Mo. 1919, Vol. II, p. 2016), and this classification has been repeatedly recognized as valid, as is clearly shown by the opinion of the Supreme Court of Missouri in *Massachusetts Bonding & Insurance Company v. Chorn*, 274 Mo. 15, and *Banker's Life Company v. Chorn*, 186 S. W. 681.

In fact, as we understand, any thought that the exclusion of express companies which pay an annual tax on their gross receipts and insurance companies which pay an annual tax on their gross premium receipts, is an invalid classification or is an unlawful discrimination has been abandoned by appellant.

Certainly it cannot be contended that the separation of all other corporations into two classes, to-wit, those organized for profit and those not organized for profit, is an unlawful classification. The general recognized rule is that the tax must be uniform upon taxpayers following the same pursuits under the same condition and circumstances, but that a difference in the latter justifies a difference in the tax.

State ex rel. v. Henderson, 160 Mo. l. c. 216-217;
 Pacific Express Company v. Seibert, 142 U. S. l. c. 351;
 Bells Gap Ry. Co. v. Penn., 134 U. S. 237;
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 Adams Express Co. v. Ohio, 165 U. S. 194, l. c. 228-229;
 Banker's Life Co. v. Chorn, 186 S. W. 681;
 Massachusetts Bonding Co. v. Chorn, 274 Mo. 15;
 Masonic Aid v. Waddill, 138 Mo. l. c. 637;
 City of Aurora v. McGannon, 138 Mo. l. c. 49.

We assume that this general rule will not be questioned, nor can we believe that any serious contention can be made that the classification of corporations for the purposes of taxation into the two separate classes, to-wit: Those organized for profit, and those not organized for profit, is arbitrary, or discriminatory.

The error into which the District Court fell in the Southwestern Bell Telephone case was in assuming that the corporation franchise tax law attempted to exempt corporations organized for profit with capital stock of no par value from the

tax imposed by Section 1, and to impose upon them merely the annual fee of \$25.00 under the provisions of Section 6. The opinion of the Supreme Court of Missouri in *State ex rel. Standard Tank Car Company v. Sullivan* (221 S. W. 728), does not justify any such assumption, and the law by its very terms precludes any such construction.

C.

The State Tax Commission, in its application of the Corporation Franchise Tax Act, has, by general order, required all corporations organized for profit, with capital stock of no par value, to report the value and location of their property and assets and has applied the same measure in determining their tax that it applied to appellant and that it applies to all other corporations, that is, it measures the tax by the proportion of property and assets located in the State of Missouri, and taxes them at the same rate. This order was made following the decision of the Supreme Court of Missouri in the *Standard Tank Car Company* case and is applied to all corporations.

In *Mountain Timber Company v. Washington*, 243 U. S. 219, l. c. 237, this court said: "The question whether a state law deprives the party of rights secured by the Federal Constitution depends not on how it is characterized, but upon its practical operation and effect." We submit that a tax law of serious importance in the scheme for providing the necessary revenues for the state government ought not to be stricken down as violating the Federal Constitution upon mere theory, but only upon a showing that in its practical operation and effect it denies to the complaining taxpayer some right to which it is entitled under the Federal Constitution. In this case there are no facts in the record which disclose any discrimination against appellant. In fact, it made no effort to show that other corporations, belonging to the same class, were taxed on a different basis or that because a corporation was organized with capital stock of no par value that it was exempt from the tax and subject only to the annual fee of \$25.00. The record in this case is absolutely barren of any facts from which the court can say that in its "practical operation and effect"

the law discriminates against appellant and in favor of corporations with capital stock of no par value or corporations without capital stock. It will be time enough to adjudge the law invalid when a case arises in which the record discloses that the Missouri authorities have so applied the law as to bring it in conflict with the Federal Constitution and to deny to taxpayers rights which the Constitution guarantees to them.

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MERRILL E. OTIS,

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FRANK W. McALLISTER,

Solicitors for Appellees.

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The Franchise Tax Act is unconstitutional and void and deprives the corporations coming within its provisions of their property without due process of law and denies to them an equal protection of the laws contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, and Section 30 of Article II of the Constitution of the State of Missouri, in that there is no provision whatsoever in said Act for any notice, any hearing, any opportunity to be heard or any review at any time before the assessment of the State Tax Commission or the State Board of Equalization (as the case may be) is made a final judgment against them, or any time before the excessive and ruinous penalties provided by the Act are incurred, or at any time before the tax becomes due and payable or at any time before the tax becomes a lien upon their property in Missouri..... 3, 5-36

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30 of Article II of the Constitution of the State of Missouri by imposing the tax on the basis of their capital stock **and surplus**, or, more correctly, upon their **gross assets located in Missouri**, instead of imposing the tax on the basis of their capital stock **employed in business in Missouri alone**, as provided by Section 1 of the Act..... 3, 36-69

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

ST. LOUIS-SAN FRANCISCO
RAILWAY COMPANY,

Appellant,

v.

LARENZO D. THOMPSON, State Treasurer of the State of Missouri, and
JESSE W. BARRETT, Attorney-General of the State of Missouri,
Appellees.

No. 636.

Brief and Argument as Amici Curiae Submitted on Behalf of the Southwestern Bell Telephone Company and Simmons Hardware Company, Rice-Stix Dry Goods Company, Ely & Walker Dry Goods Company, Standard Leather Goods Company, Rothschild Bros. Hat Company, Stix, Baer & Fuller Dry Goods Company, Leader Building Company, Locust Street Annex Realty Company, Werner & Werner Clothing and Furnishing Goods Company, Arthur Real Estate Company, Premium Realty and Investment Company, Ely & Walker Dry Goods Building Company.

FOREWORD.

Pursuant to permission granted by an order of this Court entered in the above-entitled cause on Febru-

ary . . . 1921, the undersigned, corporations, as friends of the Court, join the appellant herein in briefing said cause.

The appellees, in applying to have this cause advanced to an early hearing before this Court, stated that there were quite a number of cases pending in the Circuit Courts of the State of Missouri and in the United States District Court for the Central Division of the Western District of Missouri involving the validity of the Franchise Tax Act and involving a great many of the same questions presented to this Court in this cause, and that the plaintiffs in those suits were withholding the payment of their taxes until after a decision of this cause by this Court.

The Southwestern Bell Telephone Company now has two cases pending in the United States District Court for the Central Division of the Western District of Missouri involving the assessments for the years 1919 and 1920, respectively. The other corporations joining herein as friends of the Court have suits pending in the Circuit Court of Cole County, Missouri, involving the assessments for the years 1919 and 1920, respectively.

The said cases of the Southwestern Bell Telephone Company were argued and submitted before three Judges in Kansas City, Missouri, on February 14th, 1921, on applications for temporary injunctions. Among the points raised in those cases, the points ap-

pearing in appellant's brief as points (e) and (d) were raised. These points, briefly stated, are as follows:

POINT I.

The Franchise Tax Act is unconstitutional and void and deprives the corporations coming within its provisions of their property without due process of law and denies to them the equal protection of the laws in that there is no provision whatsoever in said act for any notice, any hearing, any opportunity to be heard, or any review at any time before the assessment of the State Tax Commission or the State Board of Equalization (as the case may be) is made a final judgment against them, or at any time before the excessive and ruinous penalties provided by the act are incurred, or at any time before the tax becomes due and payable, or at any time before the tax becomes a first lien upon their property in Missouri.

POINT II.

The State Tax Commission, in assessing the tax and applying the Act, disregarded the provisions of the Act and deprived corporations, which employ a part of their capital stock outside of the State of Missouri, of their property without due process of

law by imposing the tax on the basis of their capital stock **and surplus**, or more correctly upon their **gross assets located in Missouri**, instead of imposing the tax on the basis of their **capital stock employed in business in Missouri alone**, as provided by Section 1 of the Act.

These two points will be briefly discussed herein and will hereinafter be referred to as Point I and Point II, respectively, Point I directly involving the constitutionality of the law and Point II involving the validity and constitutionality of the assessments of corporations employing part of their capital stock outside of the State of Missouri.

POINT I.

The Franchise Tax Act makes the tax imposed by it dependent in the first place upon an assessment (sections 1 and 3). In order to arrive at the tax base, the Commission must make a finding of value based upon evidence (section 3). The Commission can make this finding from the facts reported by the taxpayer in its report "and from any facts within or coming to its knowledge" (section 3). **The Commission could very well disregard the report entirely and assess the entire tax upon mere hearsay or rumor without consulting the taxpayer at all in regard to the truthfulness of such hearsay or rumor.** The taxes which may be so assessed, without any notice to the taxpayer, or any opportunity for him to be heard on the correctness of the assessment, are to be assessed by the Commission on or before the 20th day of February in each year and are made due and payable on or before the following 15th day of April **without notice** (section 3). If any corporation fails to pay such tax on or before the first day of May (a period of fifteen days from the due date), such corporation, by its mere failure for whatsoever reason to pay the tax on or before the first day of May, incurs "a penalty of 25 per cent and interest at the rate of 1 per cent per month" (section 8). **"The taxes and penalties to be paid by the provisions of this Act shall be**

a first lien on all the property and assets of the corporation within this state" (section 7). If any corporation, for any reason whatsoever, fails or neglects to make the report required by the Act within the time required by the Act, such corporation so failing or neglecting to make the report, "shall forfeit its charter, or if a foreign corporation, shall forfeit its right to engage in business in this state" (section 9).

Although the Act contains all the above drastic provisions which are so severe in their nature that they possibly of themselves constitute an independent ground for urging the unconstitutionality of the Act, the Act contains absolutely no provision whatsoever for any notice, opportunity to be heard, hearing or review, either before or after the assessment of the tax, or before or after the unduly severe and ruinous penalties are incurred, or before or after the penalties and taxes become a first lien on plaintiff's property. Under these circumstances, failure of the Act to provide for notice, hearing, and opportunity to be heard, or a review, constitutes a taking of the taxpayer's property without due process of law and a denial to the taxpayer of the equal protection of the laws contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the

State of Missouri, and renders the entire Act absolutely null and void.

The following authorities demonstrate that the Act is unconstitutional and void, **irrespective of every other point** raised by the appellant herein:

Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027. On pages 1031 and 1032 the Court said:

“Thus construed, and as applied in this case, we think section 2677 is repugnant to the ‘due process of law’ provision of the Fourteenth Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one’s property to satisfy his alleged debt or obligation; and in our opinion the other sections do not adequately supply the defect.”

* * * * *

“To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits (**Rees v. Watertown**, 19 Wall. 107, 123, 22 L. Ed. 72, 77).

“Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion be deemed a substantial substitute for the due process of law that the constitution requires. In **Stuart v. Palmer**, 74 N. Y. 183, 188,

30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the Court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. **The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.**' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 323, 333, 51 L. Ed. 204, 208, 27 Sup. Ct. Rep. 87, the Court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute' (citing the New York case). So, in Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, 52 L. Ed. 134, 141, 28 Sup. Ct. Rep. 47, the Court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' In Roller v. Holly, 176 U. S. 398, 409, 44 L. Ed. 520, 524, 20 Sup. Ct. Rep. 410, the Court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in Louisville &

N. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.' "

Central of Georgia Railway Co. v. Wright, 207 U. S. 127, 52 L. Ed. 134. On pages 141 to 143 the Court said:

"Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. (Authorities.)

"In the late case of **Security Trust & S. V. Co. v. Lexington**, 203 U. S. 323, 51 L. Ed. 204, 27 Sup. Ct. Rep. 87, decided at the last term of this court, the subject underwent consideration, and it was there held that, before an assessment of taxes could be made upon omitted property, notice to the taxpayer, with an opportunity to be heard, was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace."

* * * * *

"Reluctant as we are to interfere with the enforcement of the tax laws of a state, we are con-

strained to the conclusion that this system does not afford that due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the Fourteenth Amendment to protect against impairment by state action."

Embree v. K. C. & L. B. Road Dist., 240 U. S. 242, 60 L. Ed. 624. On page 627 the Court said:

"As the district was not established by the legislature, but by an exercise of delegated authority, there was no legislative decision that its location, boundaries and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and, this being so, it was essential to due process of law that the landowners be accorded an opportunity to be heard upon the question whether their lands would be thus benefited. If the statute provided for such a hearing, the decision of the designated tribunal would be sufficient, unless made fraudulently or in bad faith (Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 167, 174, 175, 41 L. Ed. 269, 391, 394, 17 Sup. Ct. Rep. 56)."

Londoner v. Denver, 210 U. S. 373, 52 L. Ed. 1103. On pages 1112 and 1113 the Court said:

"From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them. Upon

these facts, was there a denial by the state of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

“In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the constitution does impose, this court has regarded substance, and not form. **But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing (Authorities).”**

* * * * *

“It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.

“If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more

than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal (Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 426, 38 L. Ed. 1031, 1036, 14 Sup. Ct. Rep. 1114; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 171 et seq., 41 L. Ed. 369, 393, 17 Sup. Ct. Rep. 56).

“It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the state (Raymond v. Chicago Union Traction Co., 207 U. S. 20, ante, 78, 28 Sup. Ct. Rep. 7). The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it.”

Hagar v. Reclamation Dist., 111 U. S. 701, 28 L. Ed. 569. On page 572 the Court said:

“It is sufficient to observe here that by ‘due process’ is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties,

it must give them an opportunity to be heard respecting the justice of the judgment sought.

“The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty or property. Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable.

“Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and, generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is

the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

“But where a tax is levied on property, not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in.”

C. M. & St. P. Ry. Co. v. Drainage Dist., 253 Fed. 491. On page 493 the Court said:

“It is well settled that the legislature may prescribe the mode by which taxes shall be levied and the amount determined. It may fix the tribunal, or designate the body of men who shall act in making appraisement and assessment. It is not necessary to ‘due process of law’ that the matter shall ever come before a court. **All that is necessary is that at some stage in the proceedings the parties affected shall have an opportunity to be heard.** In the recent case of **St. Louis & Kansas City Land Co. et al. v. Kansas City**, 241 U. S. 419, 36 Sup. Ct. 647, 60 L. Ed. 1072, the Supreme Court of the United States says:

“‘Where assessments are made by a political subdivision, a taxing board, or court, according to special benefits, **the property owner is entitled to be heard as to the amount of his assessment and upon all questions properly entering into that determination.**’ ”

Jackson Lbr. Co. v. McCrimmon, 164 Fed. 759. On pages 761 and 762 the Court said:

“It will be observed from this statement of the case that the plaintiff seeks his remedy here on the theory that the tax statute of Florida (Chapter 5596, p. 1, Laws Fla. 1907) is defective in respect to the essential requirements of notice and opportunity to the taxpayer, and that the provisions of the statute therefore fail to meet the

requirements of due process of law, as ordained by the Fourteenth Amendment. All that due process implies when applied to tax proceedings may not be readily defined, but enough has been said on the subject by judges and text-writers to leave no uncertainty that the '**door of opportunity**' must be open to the taxpayer to at least importune and plead with the powers who would '**lade him with burdens grievous to be borne**.' While the process of taxation may not require the same kind of notice as judicial proceedings, or even proceedings for 'betterment' assessments, or taking private property under power of eminent domain, the Supreme Court has settled the law that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of that power that opportunity to appear and to be heard is **indispensable**; that somewhere during the process of assessment the taxpayer must have notice and opportunity to be heard; that it must be provided as an essential part of the statutory provision, and not awarded as a mere matter of grace to the taxpayer (Weyerhauser v. Minn., 176 U. S. 550, 20 Sup. Ct. 485, 44 L. Ed. 583; Central of Ga. v. Wright, 207 U. S. 137, 28 Sup. Ct. 47, 52 L. Ed. 137; Londoner v. Denver, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103; Security Trust Co. v. Lexington, 203 U. S. 323, 27 Sup. Ct. 87, 51 L. Ed. 204). We have seen that notice is a fundamental requisite to the validity of the assessment, and that it must be provided for in the legislative scheme for taxation, or the statute may be repugnant to the due process requirement of the Fourteenth Amendment."

Scott v. City of Toledo, 36 Fed. 385. On page 397 the Court said:

“It admits of no doubt that the assessment in question was an exercise of the taxing power of the state. * * * Nor is it any longer an open question that the provision of the Federal Constitution prohibiting the states from depriving any person of his property ‘without due process of law’ applies to taxation by the state or its subordinate agencies, and that in respect to all such taxation based on values and apportionment, and involving judicial or quasi-judicial ascertainment and determination as to the amount to be imposed upon the citizen or made a charge upon his property, ‘due process of law’ demands and requires that, at some stage in the proceedings, before the tax charge or assessment is fixed and made final and collected, he shall have notice, or an opportunity to be heard in reference thereto. This subject has been so ably and exhaustively discussed and considered in numerous recent decisions of the federal and state courts, that little or nothing remains to be added; nor is it deemed necessary to extend this opinion by quoting at length from those authorities which establish the general proposition that it is essential to the validity of state taxation, other than that of a personal character, such as licenses for privileges, or the exercise of franchises, that the taxpayer shall, at some stage in the proceeding, have notice or an opportunity to be heard; that if such notice is not given, or opportunity afforded to be heard,

either in levying or collecting the tax, the proceeding will be wanting in that 'due process of law' necessary to give it validity under the Federal Constitution. The legislature may prescribe the kind of notice and the mode in which it shall be given, 'but it cannot dispense with all notice'. The owner must in some form, in some tribunal, or before some official authorized to correct errors or mistakes, have an opportunity afforded him to be heard in respect to the proceeding under which his property is to be taken or burdened, before the tax or assessment becomes final and effectual, in order to constitute such procedure 'due process of law'."

County of Santa Clara v. Southern Pac. R. Co., 18 Fed. 385. On pages 409 to 412 the Court said:

"If, to the position of counsel that property may be classified simply because owned by a corporation, and thus differently assessed, we add the further position that the owner of the property assessed has no constitutional right to have notice of the assessment, or to be heard respecting it, though it be double or treble the value of the property—though the property be assessed at thousands, when worth only hundreds—we have a system established with a power of oppression under which no free man should ever be contented to live.

"In the argument of counsel, the distinction between taxes for licenses and franchises, and taxation upon values, seems to have been overlooked, and because no notice is required in the

former case, and no opportunity given to be heard, therefore, it is contended that the rule is not sound; that **notice is necessary, and an opportunity of being heard in the latter case where an assessment is made upon property and values are found upon evidence**; yet the distinction is plain and everywhere recognized. A license tax paid by an insurance company of another state, in order to exercise its corporate powers in this state, is the consideration given for a privilege which the company may or may not take; if taken, the fee must be paid. Of course, no notice there is necessary. If a person wishes a license to do business at a particular place, or of a particular kind, such as selling liquor, cigars, clothes, or keeping a restaurant or hotel in a city, he is only to pay what the law requires and go into the business. Notice in such cases would be of no service to him, and no hearing could change the result. And the state may exact the payment of a particular sum—such as it deems proper—as a condition of the grant of corporate powers, or for their continuance, and may reserve the right to alter this condition as it may choose; or rather, the state might have exercised such power and made such exaction had she not by her constitution declared that franchises should be assessed and taxed as property, according to their value. But for this provision no notice could be required of the amount demanded for the privilege granted, nor opportunity of being heard respecting it; for notice or hearing could be of no service to the company. **Here we are not con-**

sidering the compensation to be paid for franchises or privileges of any kind, whether designated as taxes or license fees, but of taxation upon values. Where these are to be ascertained, and evidence is to be taken for that purpose, and a determination is to be made which is judicial in its character, there the owner must in some form—in some tribunal—have an opportunity afforded him to be heard respecting the proceeding under which his property may be taken before such proceeding becomes final and the valuation is irrevocably fixed. And in such cases there can be no valid deprivation of his property without it.

"The notice to which we refer need not be a personal citation; it is sufficient if it be given by a law designating the time and place where parties may contest the justice of the valuation. As a general rule only a statutory notice is given. The state may designate the kind of notice and the manner in which it shall be given. All that we assert, or have asserted, is that there must be a notice of some kind which will call the attention of the parties to the subject, and inform them when and where they will be permitted to expose any alleged wrong in the valuation of which they may complain.

"It was with reference to the class of cases where values are to be found upon evidence, that we said in the San Mateo suit that notice and opportunity to be heard were essential to the validity of the assessment, and without which the proceeding by which the taxpayer's property was taken from him would not be due process of law. We have heard nothing in the argument

of the present cases or in the criticism of the authorities which in the slightest degree affects the accuracy of the statement. In **Stuart v. Palmer**, 74 N. Y. 191, the Court of Appeals of New York, in an elaborate opinion, speaking by Mr. Justice Earl, said:

“ ‘It is difficult to define with precision the exact meaning and scope of the phrase “due process of law”. Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably better, as recently stated by Mr. Justice Miller, of the United States Supreme Court, “to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded’ (**Davidson v. New Orleans**, 96 U. S. 104). It may, however, be stated generally that due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. **A hearing, or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this.**’

“And again:

“ ‘It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceedings. That due process of law requires this has been quite uniformly recognized.’

"Numerous other authorities might be cited to the same purport, and the language of Judge Cooley in his treatise on Taxation, which exhibits a thoughtful consideration of the subject, and a careful examination of the adjudged cases, expresses the established law. Speaking of tax cases, he says:

"We should say that notice of proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is "due process of law" for these cases, and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended or could be construed to sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard; and it has also been justly observed of taxing officers that "it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may choose, without giving any notice to the owner. It is a power liable to great abuse"; and it might safely have been added, it is a power that, under such circumstances, would be certain to be abused. "The general principles of law applicable to such tribunals oppose the exercise of any such power" (Cooley, Tax'n, 266)."

"The clause of the constitution which forbids

deprivation of property without due process of law places liberty under the same guaranty, and no one can be deprived of either—property or liberty—under the name of taxation, any more than under any other name, by officers of the state, without some notice of their proceedings, and a right to be heard respecting their determination before it is executed."

See, also, **Meyers v. Shields**, 61 Fed. 713, l. e. 721 to 725.

The Supreme Court of Missouri is in accord with these authorities, as witness the case of **State ex rel. Carleton D. G. Co. v. Alt**, 224 Mo. 493, where, on page 507, the Court said:

"When the State, or a municipality by authority of the State, imposes a license tax, it fixes the amount and there is no assessment or any need of one; neither is there any necessity for notice of a hearing. But, as said by Mr. Justice Field in **Hagar v. Reclamation District**, 111 U. S. 710: 'Where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially' * * *."

In attempting to answer this point, the appellees, on pages 28 to 33 of their brief in this cause, took the position that section 8 of the act gives all the hearing

necessary to due process of law by providing that the taxes shall be collected by a suit. Section 8 is as follows:

"Sec. 8. Delinquents—How Collected—Penalty
—If any corporation fails or refuses to pay the taxes assessed against it under the provisions of this act on or before the first day of May the state treasurer shall certify a list of such corporations so delinquent to the attorney-general, who shall proceed forthwith to collect the same, together with a penalty of twenty-five per cent and interest at the rate of one per cent per month. Suits for the collection of such taxes may be brought in the name of the state in any court of competent jurisdiction and any judgment rendered therein in favor of the state shall be a first lien on all the property and assets of the corporation within this state."

This contention that section 8, by providing that the taxes shall be collected by suit, thereby affords an opportunity to be heard sufficient to satisfy the Fourteenth Amendment to the Constitution of the United States, is untenable for two reasons:

1. The provision of the act allowing the Commission to assess the tax even on hearsay and rumor without consulting the taxpayer; the provision that the mere failure to make the report shall be penalized by forfeiture of the taxpayer's charter; the provision that the tax so assessed without notice or an opportunity

to be heard, shall be due and payable without notice less than two months after the assessment, **irrespective of whether or not the taxpayer has been notified or can obtain information regarding the amount of his assessment and tax**; the provision that the mere failure to pay the tax so assessed two weeks after it is due, **even though the taxpayer cannot, as a matter of right, obtain from the Commission the amount of the tax**, is visited by a penalty of 25 per cent of the total tax plus a further penalty of 1 per cent per month (considerably over 12 per cent per year, which is figured on the original amount of the tax plus the 25 per cent initial penalty); and the provision that immediately, as soon as the tax is assessed, it becomes a first lien upon the taxpayer's property, and the moment he, for any reason, howsoever good, fails to pay the tax upon the very day specified in the act, the ruinous penalties attach and become a first lien upon the taxpayer's property; all these provisions taken together show that the mere provision in section 8 for the collection of the taxes by a suit does not afford the taxpayer any remedy whatsoever. On the contrary, **these drastic provisions**, especially the provision in regard to the taxes and penalties being a first lien and the provision in regard to the severe penalties, **negative any idea that the legislature intended to provide a hearing, opportunity to be heard, or review by the provision for suit contained in sec-**

tion 8. It is apparent that these provisions were inserted by the Legislature for no legitimate purpose; but for the sole and only purpose of bullying the taxpayer into paying the tax assessed by the Commission, whether rightfully or wrongfully assessed without resort to the courts to test the correctness of the amount of the assessment, or to test the validity of the assessment, or to test the constitutionality of the law itself, for fear of being ruined, in case he should not be successful in such litigation. This is even more apparent when it is remembered that the penalty of 25 per cent and the 1 per cent per month interest will amount to more than the original amount of the tax within a very short time, and, in fact, long before any case could be prosecuted to a final determination through the courts.

Bear in mind that we are not contending at this time that the law is unconstitutional on the ground of the excessive penalties. What we are contending is that the above-named provisions of the act, including the penalty provision, clearly negative any idea that due process of law is afforded by the provision contained in section 8 for the collection of the taxes and penalties by a suit.

We have been unable to find any case, and we venture to say that there is none, in which any court has held that a mere provision for the final collection of the taxes by suit, coupled with the other severe

and unreasonable provisions of the act, constitute due process of law. On the contrary, it has been repeatedly held by this Court that penalties, such as those prescribed by this act, are in themselves a denial of due process of law, in that they are so severe that it is apparent that they were imposed for the purpose of compelling the taxpayer to pay the tax without resort to the courts for fear of being ruined by the accumulation of penalties in the event the taxpayer should be unsuccessful in the litigation. **A provision for the collection of the taxes by suit, such as provided by section 8, under the circumstances of this case, affords the taxpayer absolutely no protection.** It is not the protection afforded the taxpayer by the Fourteenth Amendment to the Constitution of the United States, for the obvious reason that it is not reasonable in that it affords the taxpayer no protection and no remedy unless the taxpayer is willing to run the risk of being wiped out of existence in case he is unsuccessful.

The following cases deal with severe penalties, but also clearly state the principles of law applicable to this case:

Ex parte Young, 209 U. S. 123, 52 L. Ed. 714: On pages 723 and 724 of the report in 52 L. Ed. the Court said:

“Another federal question is the alleged unconstitutionality of these acts because of the

enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employes, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation.

* * * * *

“Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight acts the officers, directors, agents and employes of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the Passenger-Rate Act renders the party guilty of a felony and subject to a fine

not exceeding \$5,000 or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents or employes willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. The company, in order to test the validity of the acts, must find some agent or employe to disobey them at the risk stated. **The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or federal) for the purpose of testing its validity.** The officers and employes could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the Court should decide that the law was valid. **The result would be a denial of any hearing to the company.** The observations upon a similar question, made by Mr. Justice Brewer in **Cotting v. Kansas City Stock Yards Co.** (Cotting v. Goddard), 183 U. S. 79, 99, 100, 102, 46 L. ed. 92, 105, 106, 22 Sup. Ct. Rep. 30, 38-40, are very apt. At page 100 he stated: 'Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon a failure to make good that claim or defense, the penalty for such failure either appro-

priates all his property or subjects him to extravagant and unreasonable loss?' Again, at page 102, he says: 'It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if **extreme and cumulative** penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that **here presented**. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.' The question was not decided in that case, as it went off on another ground. We have the same question now before us, only the penalties are more severe in the way of fines, to which is added in the case of officers, agents or employees of the company, the risk of imprisonment for years as a common felon (see, also, *Mercantile Trust Co. v. Texas & P. R. Co.*, 51 Fed. 529-543; *Louisville & N. R. Co. v. McChord*, 103 Fed. 216-223; *Consolidated Gas Co. v. Mayer*, 146 Fed. 150-153). In *McGahey v. Virginia*, 135 U. S. 662-694, 34 L. ed. 304-314, 10 Sup. Ct. Rep. 972, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which impose conditions not existing when the contract was made, was to offer no remedy; and, when the

remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given (see, also, *Bronson v. Kenzie*, 1 How. 311, 317, 11 L. ed. 143, 145; *Seibert v. Lewis* [*Seibert v. United States*], 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190). If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this Court has held such a law to be unconstitutional (*Chicago, M. & St. P. R. Co. v. Minnesota*, *supra*). **A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional.** It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

* * * * *

“We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates.”

2. The position of the appellees is untenable for the further reason that a suit for the collection of the taxes, **even though no penalties are involved**, does not afford any hearing, opportunity to be heard, or review at all. The Supreme Court of Missouri has held that a commission or board, in fixing the value of property for the purposes of taxation, acts judicially, and its valuations have the force and effect of judgments of courts, which cannot be collaterally attacked. The only way the assessment can be attacked is by a direct attack upon the assessment itself for the purpose of vacating, annulling and setting it aside. **Even if the board or commission exceeds its powers or statutory jurisdiction and such fact appears upon its record, the assessment cannot be corrected in a suit for the collection of the taxes, but must be quashed in a proceeding by certiorari.**

Therefore, it is apparent that the provision in section 8 for the collection of the taxes by suit does not afford the taxpayer any opportunity whatsoever to be heard upon the correctness of the amount of his assessment or upon any other defense that he might have.

The Supreme Court of the State of Missouri, en banc, on June 14th, 1919 (rehearing denied July 7th, 1919), has settled the law in this state in a very well-considered opinion as to what defenses are open

to a citizen in a suit for the collection of state taxes. The Court is respectfully referred to the case of **State ex rel. Johnson, Tax Collector, v. Merchants & Miners Bank et al.**, 213 S. W. 815, 279 Mo. 228.

The appellees have relied upon the case of **Embree v. Road District**, 257 Mo. 593 (affirmed in this court, 240 U. S. 242, 60 L. Ed. 624), to sustain them in their contention that section 8 of the act affords a hearing (Appellees' Brief, pp. 30 to 33). This case is distinguishable from the present case in several particulars, and is rather an authority for the appellant than the appellees, to wit:

(a) The taxes involved were special benefit assessments. The Supreme Court of Missouri, on pages 610 and 611, call attention to this fact and expressly distinguish taxes for general state purposes (such as those involved in the case at bar) from the special benefit assessments involved in the Embree case, holding that the latter are not strictly taxes at all, and in the latter, as distinguished from the former, it (the Supreme Court of Missouri) and this Court have repeatedly held that all defenses are open to the taxpayer in a suit on a tax bill that would be open to him in a suit for an ordinary debt. See, also, the case cited by the Court on page 611, to wit: **Ranney v. City of Cape Girardeau**, 255 Mo. 514.

As appears from the Johnson case (*supra*), the rule in regard to defenses available to the taxpayer

in suits for the collection of taxes for general state purposes such as those involved in the case at bar, is entirely different.

(b) The case is further distinguishable by reason of the fact that the statute in question in the Embree case provided for ample notice and ample hearing before the lands were included in the district, and this Court decided the case expressly on this ground (60 L. Ed., 1. e. 628, 240 U. S., 1. e. 249).

(c) The portion of this Court's decision, quoted on page 33 of the brief of the appellees, is the last paragraph of the opinion and was not the basis of this Court's decision. However, it does not support appellees' contention, since this Court expressly says that the Supreme Court of Missouri has held that landowners can raise the question of the value of their lands in a suit for the collection of the special assessments and can raise any other defenses they may have, whereas the law in regard to defenses available to the taxpayer in suits for the collection of general state taxes is exactly the reverse, as witness the Johnson case (*supra*).

(d) The Embree case is further distinguishable by reason of the fact that the statute under consideration contained no such drastic provisions as those contained in the act before this Court in the present case. In the statute under consideration in the Embree case there was no provision that the assessments were

to be a first lien on the taxpayer's property from the date of the assessment, nor was there any severe penalty clause. The penalty clause in the act construed in the Embree case is section 10620, and provides for 1 per cent interest from the first day of the January following the presentation of the tax bill for each month that the tax bill remains unpaid, and if the tax bill is not paid within six months the holder thereof may bring suit on the same.

The only other case particularly relied upon by the appellees is the case of **Hagar v. Reclamation District**, 111 U. S. 701, 28 L. Ed. 569. This case is also distinguishable on the ground that it involved special benefit assessments and not taxes for general state purposes. It is distinguishable on the further ground that the California laws, under which the assessment was made, allow the taxpayer to raise all defenses in a suit for the collection of special assessments. It is more of an authority for the appellant than for the appellees.

It is, therefore, submitted that Section 8 of the Missouri Franchise Tax Act does not afford due process of law and that nowhere in said act is there any provision for notice, hearing and an opportunity to be heard or a review sufficient to enable this Court to hold said act valid in face of the Fourteenth Amendment to the Constitution of the United States.

POINT II.

Point I dealt with the unconstitutionality of the act. This point deals entirely with the unconstitutionality of the assessment, since some of the corporations that appear here as friends of the Court, as well as the St. Louis-San Francisco Railway Company, appellant, are corporations employing a part of their capital stock outside of the State of Missouri. Therefore, they come within the provisions of clause 2 of section 1 of the act, providing that such corporations shall be taxed on the base of their capital stock employed within the State of Missouri and not upon their capital stock and surplus irrespective of where it is employed.

This act appears in the Session Laws of Missouri for 1917 at pages 237 to 242. Section 1 of the act was amended by the Legislature of 1919 by changing the tax rate from $3/40$ of 1 per cent to $1/10$ of 1 per cent (Session Laws of Missouri, 1919, pages 236 to 237). Our contention is that under the plain provisions of section 1 of the act, corporations of the class here covered are taxed only on such of their capital stock as is employed in business in Missouri; they are not taxed upon capital stock and surplus employed in the State of Missouri; nor are they taxed upon gross assets located in the State of Missouri. However, the

State Tax Commission, in applying the act and assessing the tax, disregarded the act and taxed these corporations not only on their capital stock employed in business in the State of Missouri, but taxed them on the basis of their gross assets located in the State of Missouri irrespective of whether or not any of such assets were employed in business in the State of Missouri.

The first clause of section 1 of the act as it appears in the Session Laws of 1917 is as follows:

"Every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri equal to 3/40 of 1 per cent of the **par value** of its outstanding capital stock and surplus."

The second clause of the same sentence is as follows:

"Or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to 3/40 of 1 per cent of its capital stock employed in this state."

It is clear, by clause 1 of the first sentence of section 1, read in connection with clause 2 of the first sentence of section 1, that the Legislature, by clause 1, intended to and did impose a tax on all Missouri cor-

porations except corporations employing a part of their capital stock in another state or country of 3/40 of 1 per cent of the par value of such corporations' outstanding capital stock and surplus, without reference to where such surplus is employed, whether within or without Missouri, and, furthermore, without reference to whether such capital stock and surplus is employed in the company's business or is simply composed of idle investments and in no sense employed in the company's business. In other words, the tax is based on capital stock and surplus, irrespective of the fact as to its being "employed in business" at all. It is also clear that the Legislature, by clause 2 of the first sentence in section 1, imposed a tax on Missouri corporations employing a part of their capital stock in business in another state or country of 3/40 of 1 per cent of such corporations' capital stock alone employed in business in Missouri.

The next clause of the first sentence of section 1 of said act is as follows:

"And for the purposes of this act, such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located."

The first and second clauses of the first sentence in section 1 above quoted are the taxing clauses and are,

therefore, the very essence of the act. They are phrased in clear, unequivocal language. There is no ambiguity as to their meaning. It is plain that the legislature intended to say and did say that domestic corporations employing a part of their capital stock in another state or country were to pay the tax on the basis **of the amount of their capital stock employed in business in this state**, without reference to surplus, and all other domestic corporations were to pay the tax based on their capital stock **and surplus** without reference to where that surplus might be invested, whether within or without Missouri and without reference as to whether or not their capital stock and surplus were "employed in business" in this state or not. Then follows clause 3 in which the words "and surplus" are used after the words "capital stock".

It is clear that **clause 3 is merely a rule for ascertaining a ratio on which to figure the tax** and it possibly refers to both of the preceding clauses, fixing the ratio at the proportion which assets in this state bear to the total assets wherever located. After this ratio is determined, it is necessary then to go back to clauses 1 and 2 to find out to what this ratio is to be applied, i. e., in the case of corporations employing all of their capital stock in Missouri, the ratio would be applied to their capital stock and sur-

plus, and in case of corporations employing a part of their capital stock outside of the State of Missouri, the ratio would be applied to their capital stock alone employed within the State of Missouri. **To illustrate:** Suppose a corporation **employing** all of its capital stock and surplus in its business to its fullest extent. Suppose such corporation has a capital stock of \$100,000 and a surplus of \$100,000; \$50,000 of its capital stock and \$50,000 of its surplus are employed in business in Missouri and \$50,000 of its capital stock and \$50,000 of its surplus are employed in business in Kansas; therefore, since the ratio is determined between assets in Missouri (it is a doubtful point as to whether or not "in Missouri" means "located in Missouri" or "employed in business in Missouri") and total assets wherever located, giving the state the benefit of all doubts, the ratio would be

$\frac{100,000}{200,000}$

, or $\frac{1}{2}$; apply this ratio to the capital stock

200,000

and the base of the tax is \$50,000; but if we apply the ratio to capital stock **and surplus**, the base of the tax is \$100,000, **or exactly double what it should be.**

It is evident from the illustration given above, that the use of the words "and surplus" in clause 3, as applied to domestic corporations employing a part of their capital stock in another state or country, serves no useful purpose, **since the ratio is determined**

by assets and is, therefore, the same whether the words "and surplus" are used or not; therefore, the words "and surplus" in clause 3, as applied to domestic corporations, employing a part of their capital stock in another state or country, are either meaningless or tautological and should be disregarded by the court in construing the act.

It is important to note at this point that the appellant fully realizes the truth of the assertion by the appellees on pages 23 and 24 of their brief, in which they state that if such an interpretation as contended for by the appellant is possible, the entire act is unconstitutional and void. However, it is to be noted that the appellees offer no reasonable explanation of clauses 1, 2 and 3 of the first sentence of section 1, especially in reference to the Marquette case (abundantly relied upon, but not quoted from by them) and Section 3 of the Act, and, as a matter of fact, the rest of the entire Act. The appellees contend that clause 3 of the first sentence of Section 1 refers entirely and absolutely to clause 2, and, therefore, that it was the manifest intention of the Legislature, as expressed by the language used, that the words "and surplus" should be written into clause 2 after the words "capital stock". This is unsound, because if clause 3 of the first sentence of Section 1 of the Act means what the appellees try to make it mean, it means that the tax is not based, as stated in

the Marquette case and in this case in the lower court, on "the extent of the use of the franchise", but is based upon the situs of the property, irrespective of whether or not such property is used at all in the company's business or whether or not such property consists of Liberty Bonds, investments in the stocks of foreign corporations, and other property, admittedly not in any sense "employed in business in Missouri". If what the appellees contend is true, this tax is merely a property tax, since it is based solely upon situs of property irrespective of the use and irrespective of whether or not such property situated in the State of Missouri is employed in business. If the words "employed in business" means nothing except situs, why did the Legislature include clause 2 of the first sentence of section 1 at all, since if clause 3 of the first sentence in section 1 is read with clause 1, the entire matter is covered?

It is important to note at this point that the appellant does not agree that it was the intention of the Legislature to write anything into clause 2 of section 1 not already written therein. It is the appellant's contention that clauses 1 and 2 mean exactly what they say; that the best explanation that can be offered for clause 3 of the first sentence of section 1 is that the draftsman, pursuing the modern ideal of brevity at the expense of clearness, sacrificed the latter and attained a result which cannot be intelligently

interpreted unless clause 3 of the first sentence of section 1 is read in connection with clauses 1 and 2 in so far as it applies to each, to wit: In the case of corporations employing all their capital stock in the State of Missouri, the ratio prescribed in clause 3 would apply to both capital stock and surplus; and in the case of corporations, such as the appellant, employing part of its capital stock outside of the State of Missouri, the ratio would apply to capital stock alone. This seems to us the only fair interpretation of the clauses of the first sentence of section 1, and it is well to confess at this point that even this explanation is not satisfactory, but we believe it is the best that can be offered.

If the Court will take any mathematical example and work it out on the contention of the appellees that the words "and surplus" should be written into clause 2 after the words "capital stock", the Court will readily see from any example, except the example in which it is assumed as a fundamental premise that all the assets of every corporation are **employed in business**, that the result will be that "situs" will be the answer and that in no case will the answer be anywhere near the actual facts as to the amount of the capital stock and surplus actually employed in the business in the state of Missouri. The Court will readily see, by working out any example under the contention of the appellees, that the appellees are

really contending that the words "employed in business in this State" mean absolutely nothing except situs. **If they do not mean the extent of the use of the franchise**, as the Missouri Supreme Court in the Marquette case and the United States District Court in this case hold, then this is not a franchise tax, but it a property tax pure and simple.

Irrespective of these considerations and irrespective of the interpretation that this Court puts upon the first sentence of section 1, it is respectfully submitted that neither this Court nor any other court has ever held that a court can so far invade the legislative function that the court can say that the legislature imposed a tax upon something entirely different from the thing upon which the legislature did impose the tax in clear, unequivocal language. The rule in regard to the construction of statutes imposing taxes approved by this Court has constantly been that tax statutes are to be strictly construed in favor of the taxpayer; that no burden not imposed by the clear, unequivocal language of the statute is to be presumed to have been imposed; that unless the Legislature has expressed itself in clear, unequivocal language in imposing the burden of the tax, all doubts will be resolved in favor of the taxpayer and he will not be held to the burden unless it is imposed by clear and unequivocal language.

The Attorney-General of the State of Missouri cannot cite any case holding that the courts will go so far as to change the tax burden in an attempt to uphold the legislative intent. The courts have uniformly held, as has this Court, that the doctrine of the strict construction of tax statutes shall not be carried to an absurdity so that the Court cannot correct mistakes of the Legislature where the intention is manifest relating to administrative matters, but no court has ever gone so far as to hold that it can, irrespective of the legislative intention as gathered from the language used, change the tax base or in any manner impose another and a different burden on the taxpayer than that imposed by the language of the statute.

It is to be noted in this connection that it is by no means admitted that the Legislature intended that the words "and surplus" should be written into clause 2 of the first sentence in section 1 after the words "capital stock." The attention of the Court is called to the following facts in regard to this matter: The words "capital stock" are used twice in clause 2 of the first sentence of section 1, and nowhere are they followed by the words "and surplus"; the words "and surplus," as used in clause 3 of the first sentence of section 1, are meaningless as applied to clause 2 of section 1; if the Legislature did not mean to create an exception in favor of corporations employing a

part of their capital stock outside of the state by virtue of clause 2, it did not mean anything, and clause 2 was inadvertently included, since clause 1, read in connection with clause 3, would cover the entire matter; this law was enacted by the Legislature of 1917. The Tax Commission had two years of experience with the law before the Legislature of 1919. **The Legislature of 1919 amended this law in one particular.** It amended section 1 by increasing the tax rate from three-fortieths of one per cent to one-tenth of one per cent and re-enacted the section. It did not change the balance of the law in one single particular. The first sentence in section 1 of this act was re-enacted by the Legislature of 1919, covering all domestic corporations. It was the most prominent sentence in the entire act. **Granting, for the sake of argument, that the Legislature of 1917 inadvertently omitted the words "and surplus" after the words "capital stock" in clause 2 of the first sentence of section 1, it was an impossibility for the Legislature of 1919, aided by the officials of the Tax Commission, to have overlooked what the state calls an absurd exception.** Undoubtedly, irrespective of what we think the Legislature intended, if they had intended that clause 2 of the first sentence of section 1 should be different from what it is, they would have said so in 1919, irrespective of what they said in 1917. Therefore, it is to be presumed that the Legislature meant

exactly what it said and that the State's contention that the Legislature did not mean what it said is not to be taken for granted at all.

Irrespective of what the Legislature meant, and irrespective of the language used, and irrespective of what the intent of the Legislature might be as gathered from the language used, appellant's contention is that this Court has no right whatsoever to change the **tax base as fixed by the Legislature**. This is a matter to be addressed to the Legislature which is now in session, and not to this Court. The law sustaining this contention is well settled and admits of no exceptions. The rules governing the construction and application of statutes imposing taxes can be briefly summarized as follows:

"Statutes imposing taxes are burdens placed by the government on its citizens. They are, therefore, to be strictly construed as a penal or criminal statute. The citizen is exempt from taxation, unless the language imposing the tax is clear and unequivocal. All doubts in respect to the construction of the statute imposing the tax are to be resolved against the government and in favor of the citizen. Nothing can be added to the statute by judicial construction, no matter what the court might think the legislature intended. The state is entitled to absolutely no rights under a statute imposing taxes, except those clearly given by the unambiguous, clear and unequivocal language of the statute."

The following cases are in point:

I. Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199. This case construed the U. S. Corporation Tax Act imposing a special excise tax on corporations. On pages 201-202, the Court said:

"At the outset it may be remarked that a statute providing for the imposition of taxes is to be strictly construed, and all reasonable doubts in respect thereto resolved against the government and in favor of the citizen. This principle is so well established that the citation of any considerable number of authorities in its support is unnecessary. In *Spreckels Sugar Co. v. McClain, Collector, etc.*, 192 U. S. 397, 416, 24 Sup. Ct. 376, 382 (48 L. Ed. 496), Mr. Justice Harlan quoted with approval the following language of Judge Gray:

"'Keeping in mind the well-settled rule that the citizen is exempt from taxation, unless the same is imposed by clear and unequivocal language, and that, where the construction of a tax is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid.'

"In *Benziger v. United States*, 192 U. S. 58, 24 Sup. Ct. 189, 48 L. Ed. 331, it was held with reference to a classification under the tariff act, that the provision of the statute—

"'should be liberally construed in favor of the importer, and, if there were any fair doubt as to the true construction of the provision in question, the Court should resolve the doubt in his favor.'

"That case cited with approval American Net and Twine Co. v. Worthington, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821, and United States v. Wigglesworth, 2 Story, 369 Fed. Cas. No. 16690, in which latter case it was held that:

"It is . . . a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import."

2. **Haiku Sugar Co. v. Johnstone**, 249 Fed. 103. This case construed the U. S. Income Tax Act for 1913. It was decided by the Circuit Court of Appeals for the Ninth Circuit on April 1, 1918. On page 109, the Court said:

"In conclusion, while the case is not free from doubt, we think that its determination should be had in conformity with the intent of the several members of the association, and that by so resolving it we are accepting the latest expression of the Supreme Court, as announced in *Gould v. Gould*, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. . . ., where it was said:

“ ‘In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen.’ ”

3. **United States v. Coulby**, 251 Fed. 982. This case construed the U. S. Income Tax Acts for 1913 and 1916. It was decided by the District Court, N. D. Ohio, E. D., June 26, 1918. On page 985, the Court said:

“The foregoing principles and authorities cited in support thereof are not those properly applicable in this situation. The principles in point are those stated in *Gould v. Gould*, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211, where it was held that alimony allowances are not income within the meaning of the 1913 Income Tax Law; that is to say, in the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out, and that in case of doubt they are to be construed most strongly against the government and in favor of the citizen. To the same effect are *United States v. Wigglesworth*, 2 Story, 369 Fed. Cas. No. 16690; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 474,

12 Sup. Ct. 55, 35 L. Ed. 821; *Benziger v. United States*, 192 U. S. 38, 55, 24 Sup. Ct. 189, 48 L. Ed. 331."

4. **United States v. Coulby** (*supra*) was affirmed in 258 Fed. 27, decided by the Circuit Court of Appeals for the Sixth Circuit, January 7, 1919, and Judge Westenhaver's opinion was adopted without change.

5. **Miller v. Gearin**, 258 Fed. 225. This case construed the U. S. Income Tax Act for 1916. It was decided by the Circuit Court of Appeals for the Ninth Circuit on May 5, 1919. On page 226, the Court said:

"We do not consider the question here involved a doubtful one; but, if there is doubt, it should be resolved in favor of the taxpayer."

For this proposition the Court cites *Gould v. Gould* and *Haiku Sugar Co. v. Johnstone*.

A petition for a writ of certiorari in this case was denied by the U. S. Supreme Court. See 64 L. Ed. 51.

6. **American Net and Twine Co. v. Worthington**, 141 U. S. 468, 35 L. Ed. 821. This case involved the construction of the U. S. Tariff Act of March 3, 1883. On page 824 of the report in 35 L. Ed., the Court said:

"We think the intention of Congress that these goods should be classed as 'gilling twine', is

plain; but were the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since **the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language.**”

7. **Eidman v. Martinez**, 184 U. S. 578, 46 L. Ed. 697.

This case involved the inheritance tax imposed by the war revenue act of June 13, 1898. On page 701 of the report in 46 L. Ed., the Court said:

“It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language * * *.

“We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that **the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language.**”

This case contains a learned, instructive and exhaustive discussion on the interpretation of tax laws.

8. **Swan & Finch Co. v. United States**, 190 U. S. 143, 47 L. Ed. 984. This case involved the construction of the “drawback” provision of U. S. Tariff Act of July 24, 1897. On page 986 of the report in 47 L. Ed., the Court said:

“Where the burden is placed upon a citizen, if there be a doubt as to the extent of the burden

it is resolved in favor of the citizen, but where a privilege is granted any doubt is resolved in favor of the government."

9. **Benziger v. United States**, 192 U. S. 38, 48 L. Ed. 331. This case involved the construction of U. S. Tariff Act of 1897. On page 338 of the report, in 48 L. Ed., the Court said:

"This provision of the statute should be liberally construed in favor of the importer, and if there were any fair doubt as to the true construction of the provision in question, the courts should resolve the doubt in his favor."

10. **Gould v. Gould**, 245 U. S. 151, 62 L. Ed. 211. This is the latest case of the U. S. Supreme Court on this subject decided November 19, 1917. It involved the construction of U. S. Income Tax Act of 1913. On pages 213 and 214 of the report in 62 L. Ed., the Court said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen (United States v. Wigglesworth, 2 Story 369, Fed. Cas. No. 16,690; American Net & Twine Co. v. Worthington, 141 U. S.

468, 474, 35 L. Ed. 821, 824; 12 Sup. Ct. Rep. 55; Benziger v. United States, 192 U. S. 38, 55, 48, L. Ed. 331, 338, 24 Sup. Ct. Rep. 189.

“As appears from the above quotations, the net income upon which subdivision 1 directs that an annual tax shall be assessed, levied, collected and paid, is defined in division B. The use of the word itself in the definition of ‘income’ causes some obscurity, but we are unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed.”

11. **Edwards v. Wabash Ry. Co.**, 264 Fed. 610. This is the **very latest case** that can be found on this subject. It was decided by the Circuit Court of Appeals for the Second Circuit on February 18, 1920. It involved the construction of U. S. Act of October 3, 1917, imposing on each original issue, whether on organization or reorganization, of certificates of stock a stamp tax of five cents on each \$100.00 of face value or fraction thereof. On pages 617-619, the Court said:

“Statutes of this kind * * * impose burdens upon the public and restrict the pursuit of occupations and the enjoyment of property. If a tax is to be sustained in any given case it must come clearly within the letter of the statute.

“We may remark, further, what we think defendant must admit, that in view of the con-

struction placed by the Treasury Department on similar acts in 1899 and in subsequent years, prior to Treasury Decision 2752 rendered August 14, 1918, overruling the earlier construction which held such an exchange of certificates not subject to tax renders the question herein presented one of considerable doubt, and, if doubtful, then the doubt must be resolved in the plaintiff's favor in accordance with the well-established rule that **where there is an ambiguity in the language of a statute imposing a tax, and that ambiguity raises a doubt as to the legislative intent, the persons upon whom it is sought to impose the burden are to be given the benefit of the doubt."**

12. **Travis v. American Cities Co.**, 182 N. Y. S. 394, holds not only that a statute levying taxes must be construed in the taxpayer's favor, but also that **the State is entitled to absolutely no rights thereunder, except those clearly given by the unambiguous, clear and unequivocal language of the statute.**

The above cases deal only with tax statutes, which, as we have seen, are to be strictly construed. It is submitted that **even in the case of remedial laws, which are to be liberally construed**, it is the uniform rule that courts cannot assume the functions of the Legislature by writing into statutes words which will correct the vital oversights or omissions of the Legislature.

Article III of the Constitution of the State of Missouri is as follows:

“The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted.”

The following cases are of interest and correctly state the law:

1. **Kehr v. City of Columbia**, 136 Mo. App. 322. In this case the Court said:

“It seems that the Court decided the case on the ground that the Local Option Statute does not provide for parties contestant and contestee in such cases. Section 3031 of the article providing for a contest contains the following:

“‘The election in this article provided for, and the result thereof, may be contested in the same manner as now provided by law for the contest of elections for county officers in this State.’ Sections 7079 and 7030 of the statute providing for contesting elections for county officers contemplate that the parties to the contest shall have been the opposing candidates for the office at the election so held; and that the one claiming

to have been elected shall be the contestant and the opposite party, who has been declared elected and has his certificate to that effect, shall be the contestee.

“Here, the plaintiffs are making no claim as candidates for office and neither are the defendants; consequently, they do not come within the express language of the law either as to contestants or contestees. But it is insisted that, as the Legislature intended that elections under the Local Option Law might be contested as a matter of right, its purpose should not be rendered nugatory by reason of the failure in the act to declare specifically who should be contestants and contestees; and that it is the duty of the courts to exercise their powers to effectuate that purpose.

• • • • • • •
“The question here is not one of proceeding, but want of jurisdiction—not of jurisdiction over the subject-matter, but by failure of the statute to provide who may institute the proceedings and against whom.

• • • • • • •
“The provision in the Local Option Law that election contests ‘may be contested in the manner as is now provided by law for the contest of elections of county officers in this State’, cannot be enforced unless we write something into the latter that was never contemplated at the time of its passage. The Legislature evidently entertained the opinion that the statute provid-

ing for the contest of elections of county officers was applicable for contest of elections under the Local Option Statute, but in this that honorable body was mistaken. 'It is a familiar rule of construction', says the Court, 'that the opinion of the legislative body as to the construction of a law can have no force unless it is given force by being enacted into a law. That the Legislature has by way of recitals or otherwise shown that it thought a certain law already upon the statute book would receive a certain construction, cannot influence the courts in construing such statute.' (Lewis' Sutherland on Statutory Construction, see. 515.)

"The same author, in section 605, quotes from eminent English authority as follows: 'We are bound', said Buller, J., 'to take the act of parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make law'. The author further proceeds to state, 'It will make no difference if it appears that the omission on the part of the Legislature was a mere oversight, and without doubt the act would have been drawn otherwise had attention been directed to the oversight at the time the act was under discussion'. And, as was said in *Crawford v. Spooner*, 6 Moore's P. C. 9, 'We cannot aid the Legislature's defective phrasing of an act, we cannot add and mend, and by construction make up any deficiencies which are left there'. And 'the language of statutes, but more especially of modern acts, must neither be extended be-

yond its natural and proper meaning, in order to supply defects, nor strained to meet the justice of an individual case'. (Lewis Sutherland on Stat. Construction, sec. 606.)

"It is clear that the Legislature overlooked the fact that the act providing for election contests for county offices could not be made to apply in cases of contests of elections under the local option law, as there was no congruity in the two enactments. We are asked to correct this oversight and write into the law contestants and contestees not provided for in either act. This we cannot do without assuming to 'add to and mend' the statute—that is, to assume as a court the functions of the legislature. All the authorities agree that this cannot be done."

This case correctly states the Missouri law.

2. **State ex inf. Crow v. West Side Street Railway Company**, 146 Mo. 155. The Court in this case, on page 169, said:

"It is needless to cite authorities to show that which is self-evident. It is manifest that an act of the legislative department cannot be enforced, when its meaning cannot be determined by any known rules of construction.

"The courts cannot venture upon the dangerous path of judicial legislation to supply omissions, or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those

authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers."

3. **Meriwether v. Overly**, 228 Mo. 218. The Court, on page 230, said:

"It may impress the legal mind as being anomalous and inexplicable that, whereas an action attacking the validity of almost any other deed may be brought at any time within ten years, a suit attacking a tax deed is barred after three years; yet the courts must accept the statutes as they find them, and if they are not unconstitutional and have not been repealed, either expressly or by other general statutes in pari materia or in the process of revision, the courts are bound to enforce them."

4. **Bankers' Life Co. v. Chorn**, 186 S. W. 681 (decided by the Supreme Court of Missouri, in banc, June 2, 1916).

The Court, on page 685, said:

"The legislature, having complete control of the business of insurance (State ex rel. v. Revelle, 257 Mo., loc. cit. 534, 165 S. W. 1084), and full power, when not constitutionally restricted, to impose whatever conditions and burdens it may deem salutary, may, by law, extend or alter the provisions of Section 7099, R. S. 1909, so

as to make them applicable to assessment companies as well as legal reserve or level premium companies. Whether their failure to act in that respect up to the present time is contrary to the dictates of sound public policy is not for us to say. **It is our province to expound and construe, on proper occasions, the laws as they appear on the statute books, but we cannot supply a *casus omissus* without usurping the peculiar prerogative of the law-making body."**

5. **State v. Long**, 220 S. W. 690 (decided by the Kansas City Court of Appeals on April 5, 1920). The Court, on page 691, said:

"There is no question but that apples, potatoes and cabbage, even though agricultural products, are goods, wares and merchandise. Section 10282 by expressly excepting agricultural products from the things covered by the phrase 'goods, wares and merchandise' clearly recognizes that such products are goods, wares and merchandise, otherwise there would be no need to exclude them. But the 1911 act has no reference to peddlers, nor does it contain any such exemption as the peddler statute. The 1911 act was passed long after the peddler act, and if such products were to be exempted from the later act, as in the former, it would seem that the Legislature would have said so. At any rate, we are not authorized to write into the statute an exemption the Legislature did not see fit to insert. * * * But whatever was the intention of the law, it is writ-

ten as above stated, and when this is ascertained we have nothing to do with the intention or effect of the law, but only with its application."

6. The Supreme Court of Missouri, even in the *Marquette Case*, construing this very act, 221 S. W. 721, at page 725, again announced this rule of law in the following language:

"The wisdom or unwisdom of particular acts of legislation is for the decision of the General Assembly. So, also, is the correction of legislative mistakes, if any."

The above are all of the Missouri cases on this subject. The *Kehr* case is the most exhaustive one of them, but the rule and principle of law are uniformly followed in each case irrespective of the particular state of facts relating to each.

The rule as declared by the Supreme Court of the United States is in accord with the Missouri rule:

1. **United States v. Goldenberg**, 168 U. S. 95, 42 L. Ed. 394. On page 398 of the report of the case in 42 L. Ed. the Court said:

"No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. * * * Certainly there is nothing which imperatively requires the court to supply an omission in the

statute, or to hold that Congress must have intended to do that which it has failed to do. Under these circumstances, all that can be determined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the action of the collector, and hence there is no warrant for enforcing any such condition."

2. *Barnitz's Lessee v. Robert Casey*, 3 L. Ed. 403, Mr. Justice Story, on page 407, said:

"There are certainly intrinsic difficulties in admitting either of these constructions. If the Legislature have proceeded on a mistake, it would be dangerous to declare that a court of law were bound to enlarge the natural import of words in order to supply deficiencies occasioned by that mistake. It would be still more dangerous to admit that because the Legislature have expressed an intention to form a scheme of descents, the court were bound to bring every case within the specified classes. In the present case, equal violence would be done to the ordinary use of the terms employed by adopting the construction contended for by either party."

3. *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940, l. c. 945:

"It is next assigned for error that the circuit court admitted the testimony of McLean and Harmon, the plaintiffs, offered in their own be-

half, in regard to transactions with and statements by Peck, he being dead, and the suit being against his assignee in bankruptcy. It is insisted that the testimony of these witnesses was incompetent under section 858 of the Revised Statutes, which provides as follows: 'In the courts of the United States no witness shall be excluded * * * in any action because he is a party to or interested in the issue tried provided, that, in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of the witnesses in the courts of the United States, in trials at common law, and in equity and admiralty.'

"The witnesses admitted by the Circuit Court were not excluded by the terms of this statute. The suit in which they testified was not an action by or against an executor, administrator or guardian. But the **counsel for the defendant** insists that the policy of the act applies to suits by or against assignees as well as to suits by or against executors, administrators or guardians, and that we ought to construe the act so as to include such suits. We cannot concur in this view. The purpose of the act was to remove generally the old incapacity to testify, imposed on parties or

persons interested in the suit. This was done by a sweeping provision, subject to certain well-defined exceptions but the exceptions did not include suits by or against assignees in bankruptcy. **We cannot insert the exception.** When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. 'We are bound,' says Mr. Justice Buller, in *Jones v. Smart*, 1 T. R. 44, 'to take the Act of Parliament as they have made it;' and Mr. Justice Story, in *Smith v. Rines*, 2 Sumn. 354, 355, observes: 'It is not for courts of justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation.' See also *King v. Burrell*, 12 A. & E. 460; *Lamond v. Eiffe*, 3 Q. B. 910; *Bloxam v. Elsee*, 6 B. & C. 169; *Bartlett v. Morris*, 9 Port. (Ala.) 266. The objection made to the admission of the testimony of the plaintiffs was properly overruled."

Further citation of authorities seems unnecessary. The rule is universal.

It is well before leaving this point to call the Court's attention to the following well-settled rules that: **There can be no lawful collection of a tax until there is a lawful assessment.** There can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose. No property is taxable but that which is re-

quired by law to be assessed for taxation. When the tax gatherer puts his finger on the citizen, he must also put his finger on the law permitting it. It is not for the Tax Assessor or Tax Collector to say what property or what interests in property are to be taxed.

The foregoing principles are applicable here, since the law makes the plaintiff's "capital stock" employed in business in Missouri the basis for the measure of the tax and the Tax Commission took something in addition to the basis fixed by the law—namely, "capital stock and surplus", thereby arbitrarily and unlawfully including property not included by the law. Therefore, as to this unauthorized inclusion of surplus in the basis of plaintiff's tax, their action was absolutely void.

These propositions are elementary and well established. See authorities already cited and cases under Points II and III (infra), and particularly the following cases:

State ex rel. Koeln v. Lesser, 237 Mo. 310. On page 318 the Court said:

"But conceding that the state has the power to tax such interests, it does not follow that such interests are taxed unless the law so declares. It is not left to the tax assessor or tax collector to say what property or what interests in prop-

erty are to be taxed. Under our system of taxation there can be no lawful collection of a tax until there is a lawful assessment and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose."

On page 321 the Court said:

"No property is taxable but that which is required by law to be assessed for taxation."

On page 328 the Court said:

"We hold that there is nothing in our statutes intended to render subject to taxation shares of stock held by a resident of this state in a foreign corporation whose property is not in this state."

This entire case is important and illuminating and it is clear from the argument that the Supreme Court of Missouri follows the general rule that specific property will not be included in general terms for the purposes of taxation unless clearly within the general terms.

Leavell v. Blades, 237 Mo. 695. On pages 700 and 707 the Court said:

“When the tax gatherer puts his finger on the citizen he must also put his finger on the law permitting it.”

“It will be time enough to tax the intangible wealth of our residents in Timbuktu, Pekin or Alaska, and never within our territorial boundaries, when the lawmaker says so in words admitting of no other construction.”

On page 710 the Court quotes with approval the above quotation from **State ex rel. Koeln v. Lesser** to the effect that it is not left to the Tax Assessor or Tax Collector to say what property or what interests in property are to be taxed, and that property and interests in property are not taxed unless the law clearly so declares.

State ex rel. Carleton D. G. Co. v. Alt, 224 Mo. 493.
On page 513 the Court said:

“We have carefully considered the argument that the Legislature, by the Act of 1895, obviously intended to pass a general law providing for the equalization of the valuations of merchants' statements, and that in justice and right it should apply to the City of St. Louis as well as to any other county in the state, but **it is axiomatic in this state that the authority to tax a citi-**

zen must be found in the written laws and not left to a matter of inference or implication."

Respectfully submitted,

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